83-5567

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT BRIAN WATERHOUSE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI IN THE
SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammel Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

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OPINION BELOW

The opinion of the Florida Supreme Court sought to be reviewed is reported as Waterhouse v. State, 429 So.2d 301 (Fla. 1983).

STATEMENT OF THE CASE AND FACTS

The Petitioner, Robert Brian Waterhouse, was indicted for the first degree murder of Deborah Kammerer. He was found guilty by a jury, and a separate sentencing hearing was held. The jury recommended death, and the trial court entered and Order sentencing Petitioner to death. Appeal was taken to the Florida Supreme Court raising the following issues:

POINT ONE

THE STATEMENTS OF THE DEFENDANT AND THE TANGIBLE EVIDENCE TAKEN FROM HIS CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THEY WERE OBTAINED AS A RESULT OF AN ILLEGAL ARREST OR DETENTION.

POINT TWO

THE TANGIBLE OBJECTS TAKEN FROM THE DEFENDANT'S CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THE POLICE OFFICERS LACKED PROBABLE CAUSE TO SEIZE THE VEHICLE PRIOR TO THE TIME THEY OBTAINED A WARRANT TO SEARCH ITS CONTENTS.

POINT THREE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO TERMINATE THEIR QUESTIONING AFTER THE DEFENDANT EXPRESSED HIS INTENTION TO REMAIN SILENT.

POINT FOUR

THE DEFENDANT'S FINAL STATEMENT SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO ADVISE THE DEFENDANT'S COURT APPOINTED ATTORNEY THAT THEY WERE CONDUCTING AN INTERVIEW.

POINT FIVE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THEY WERE NOT SHOWN TO HAVE BEEN MADE VOLUNTARILY.

POINT SIX

THE EVIDENCE OF THE DEFENDANT'S ALLEGED POSSESSION OF MARIJUANA WAS IMPROPERLY ADMITTED BECAUSE IT DID NOT MEET THE RELEVANCY TEST REQUIRED BY THE FLORIDA EVIDENCE CODE AND THE WILLIAMS RULE.

POINT SEVEN

THE EVIDENCE OF AN ALLEGED HOMOSEXUAL RAPE ATTEMPT WAS IMPROPERLY ADMITTED BECAUSE IT DID NOT MEET THE RELEVANCY TEST REQUIRED BY THE FLORIDA EVIDENCE CODE AND THE WILLIAMS RULE.

POINT EIGHT

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CAPITAL FELONY WAS COMMITTED BY THE DEFENDANT FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

POINT NINE

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CAPITAL FELONY WAS PARTICULARLY HENIOUS, ATROCIOUS AND CRUEL.

POINT TEN

THE TRIAL JUDGE ERRED IN BASING TWO AGGRAVATING CIRCUMSTANCES ON ONE PRIOR ACT OF THE DEFENDANT.

POINT ELEVEN

THE INVOLUNTARY SEXUAL BATTERY WAS AN ESSENTIAL ELEMENT OF THE HOMICIDE AND AS SUCH, IT COULD NOT CONSTITUTIONALLY BE USED AS AN AGGRAVATING CIRCUMSTANCE.

Attached hereto as Appendix I are copies of the appellate briefs filed in this cause. The Supreme Court of Florida affirmed both the judgment and sentence. Waterhouse v. State, supra. This Petition for Writ of Certiorari followed.

On the morning of January 3, 1980, St. Petersburg police received a call from a citizen indicating the nude dead body of a white female had been discovered face down in the mud flats on the shore of Tampa Bay. Examination of the body revealed numerous bruises around the throat, severe lacerations over the scalp area, the right eye was swollen and black, and there were numerous other body bruises. A blood-soaked tampon was stuffed in the victim's mouth. There were also lacerations to the rectum.

The wounds were such that they were probably made with a hard instrument such as a tire changing tool. Drag marks in a grassy area and marks on the victim's shoulder indicated the body

had been dragged. Close scrutiny of the scene revealed the girl had been dragged to the shore at high tide. The cause of death was determined to be drowning.

There were 30 lacerations and 36 bruises over the body which had been inflicted prior to her death. The rectum displayed evidence of mutilation by multiple tearing wounds. Scientific evidence indicated the victim had been anally assaulted with a penis and a foreign object. Based on the amount of hemorrhaging in the rectal area, the mutilation occurred prior to death. A front tooth was missing and there was evidence indicating this had recently happened. The medical evidence also revealed the victim had been chocked to such an extent as to cause hemorrhages in the eyes, lining of the voice box and muscles of the neck. The victim had been on her menstrual period at the time of the murder.

On January 5th the police received an anonymous phone call giving a license number in reference to the bay murder. The number given was GMU 603. The caller did not identify himself, but his voice was that of an older man, with a New England or New York accent. It was determined that the car was a Plymouth registered to Petitioner. A check of Petitioner revealed he had served eight years for the murder of a white female in New York, and he was on a life parole. The previous victim had been choked and battered and left nude. The police began a surveillance of Petitioner.

On January 7th the police received information that Deborah Kammerer was possibly the murder victim. Two of Ms. Kammerer's acquaintances, Yohan Wenz and Carol Byers testified they last saw the victim on January 2nd when the three went to the ABC Lounge. Shortly before midnight Wenz and Byers left, but Debbie remained. Kyoe Ginn, a barmaid at the ABC, stated Debbie left around 1:00 a.m. with a white male. Ginn was shown a group of pictures; she identified Petitioner as the person Debbie left with.

On the evening of January 7th, police officers asked Petitioner to voluntarily go with them to police headquarters for an interview. At this time he said that he did not know any girl named Debbie and that he went to the ABC Lounge on January 2nd but did not leave

with a woman. After this interview Petitioner was allowed to leave but his car was impounded for searching pursuant to warrant. The automobile was searched of January 8, and Petitioner was arrested on January 9.

Detectives Murry and Hitchcox arrested Petitioner. In the car on the way to the police station, after advising Petitioner of his rights, Hitchcox asked him, "We were right the other night, weren't we, when we talked to you about being involved in this case?" Petitioner responded simply, "Might." Shown a picture of Deborah Kammerer, Petitioner this time admitted that he did in fact know her.

On the afternoon of January 9, the detectives again interviewed Petitioner. Detective Murry testified concerning this interview. She said that Petitioner became emotionally upset and said repeatedly that his life was over, that he was going to the electric chair. He said that he wanted to talk to his interviewers as people and not as police officers. He then said that he had some personal problems with alcohol, sex and violence.

The two detectives interrogated Petitioner again on January 10. Again Petitioner said he wanted to talk to them as people rather than as police officers. Detective Murray testified that Petitioner again indicated that he experienced a problem involving sexual activity. He said that when he drinks a lot, it is like something snaps and he then finds himself doing things that he knows are terrible and bad, and that he cannot control his behavior on such occasions. Petitioner also told the officers that when he wanted to engage in sexual activity with a woman but learned that she was having her menstrual period, he would become frustrated and angry that this is what had happened the previous Wednesday night. He also said that he had a lot to drink on Wednesday night.

Inspection of the interior of Petitioner's car revealed the presence of visible blood stains, and a luminol test revealed that a large quantity of blood had been in the car but

had been wiped up. Analysis of the blood in the car and comparison with known blood samples of Petitioner and the victim revealed that the blood in Petitioner's car could have come from the victim but was not Petitioner's blood.

A forensic blood analyst testified that it is possible through analysis of blood stains on certain surfaces to make estimates concerning the direction and velocity of motion of the blood making the stains. This witness concluded from her analysis that the blood in Petitioner's car was deposited in the course of a violent attack.

A forensic hair analyst testified that hairs found in Petitioner's car were consistent in their characteristics with known hair samples from the victim.

A forensic fiber analyst testified that fibers found in the debris adhering to the victim's coat were similar to fibers from the fabric of the seat cover in Petitioner's car. Also fibers were found in the car that had the same characteristics as fibers from the victim's coat and pants.

Petitioner was employed as a plaster and drywall worker. His forman testified at trial that on the morning of January 3, Petitioner arrived at work asking for the day off. He appeared to have a hangover and said he was feeling rough. The witness said that at this time Petitioner has scratches on his face. The witness also said that Petitioner had told him that he liked anal intercourse and liked being with woman who allowed themselves to be hit and slapped.

ARGUMENT

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

ISSUE I

THE PRE-TRIAL STATEMENTS TO THE POLICE DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT TO COUNSEL

The Petition for Writ of Certiorari should be denied because the state courts, applying relevant federal law, found Petitioner's right to counsel had not been violated.

This Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) held a criminal defendant must be advised by police he has the right to consult with an attorney before submitting to custodial questioning. If the defendant invokes his right to counsel, interrogation must cease until the defendant has an opportunity to consult with counsel. More recent cases from this Court have interpreted Miranda as indicating once the right to counsel has been invoked, a defendant can still waive the right. However, it must be shown that the defendant initiated further contact with the police. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and Oregon v. Bradshaw, 33 Cr.L. 3211 (1983). Petitioner argues he did not initiate further contact with police, and his statement on January 9th after booking should be suppressed pursuant to Edwards.

Respondent respectfully submits the case sub judice is both factually and legally distinguishable from Edwards v. Arizona, supra. Furthermore, this case presents no new issue which cannot be resolved by applying existing federal law to the facts and circumstances of this case.

Prior to this Court's decision in Edwards the Fifth Circuit Court of Appeals and this Court had recognized invocation of the right to counsel was not a blanket prohibition against interrogation. See Michigan v. Moseley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) and Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979).

The Nash Court addressed itself to the situation, which we have here, of a defendant who makes an equivocal request for counsel.

Sub judice, Petitioner was arrested and read his Miranda rights. He acknowledged his understanding of those rights and responded to police questioning. After answering a few questions he stated, "I think I want to talk to an attorney." Questioning ceased, and the officers proceded to the police station where Petitioner was booked. Once booking was completed Officers Murry and Hitchcox told Petitioner they would come up to answer any questions he might have or talk with him, if he wanted them to. Petitioner indicated he would be interested. This is the kind of situation contemplated in Nash v. Estelle, supra., and Thompson v. Wainwright, supra. The defendant made an equivocal request for counsel, and the police further inquired to clarify the equivocation. Blasingame v. Estelle, 604 F.2d 893 (5th Cir. 1979) and Jurek v. Estelle, 623 F.2d 929 (5th Cir 1980)

This Court cited with apparent approval the Nash and Thompson holdings in footnote 9 of the Edwards opinion. The right of the police to clarify a defendant's wishes has retained viability in post-Edwards cases. See McCree v. Housewright, 689 F.2d 797 (8th Cir. 1982); White v. Finkbeiner, 687 F.2d 885 (7th Cir. 1982); Silva v. Estelle, 672 F.2d 457 (5th Cir. 1982) and Gorel v. United States, 531 F.Supp. 368 (U.S.D.C., S.D. Tex. 1981).

In Edwards there is no equivocation concerning the request for counsel. On the morning after he made it clear he only wanted to deal with the police through counsel, two detectives came to see him. Edwards said he did not want to talk, and they said he had to. Thereafter, an incriminating statement was made. Edwards request for counsel was clear; the police in essence made him talk. There was no point to be clarified; thus, the police in Edwards should have honored his request for counsel. The Nash and Thompson principles were clearly not applicable to Edwards.

by law enforcement officers to forego his clearly invoked right to counsel. Petitioner equivocally requested counsel, then voluntarily decided to deal with the police without counsel. The State Supreme Court found the police did not act improperly in further questioning Petitioner; this was also the implicit finding of the trial court. This finding is supported by the record and should be affirmed. Oregon v. Bradshaw, 33 Cr.L. at 3213 and 3214. Certiorari should be denied.

ISSUE II

THE PRE-TRIAL STATEMENT MADE AFTER COUNSEL WAS APPOINTED BUT IN COUNSEL'S ABSENCE DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT TO COUNSEL

Certiorari should likewise be denied on this issue since no new constitutional issue is involved here, and the state court opinion comports with existing federal law on the issue. Even Petitioner recognizes there is no per se rule requiring agents of the State to notify defense counsel before they talk with a defendant. A defendant can, after both requesting counsel and consulting with counsel, waive the presence of counsel and submit to police questioning. Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)

The question of a Sixth Amendment waiver is to be determined from the facts and circumstances surrounding the interrogation. United States v. Massey, 437 F.Supp. 843 (U.S.D.C., M.D. Fla. 1977 and Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019. 82 L.Ed. 1461 (1938)

On the previous evening, Petitioner had talked with Officers Murry and Hitchcox. He exercised his right to terminate the interview, but invited the officers to return the next day. In the interim, Petitioner was taken to a first appearance, and counsel was appointed. He consulted with counsel for a couple of hours. The officers returned and Petitioner evidenced a willingness to talk. He indicated he understood his rights, indeed Petitioner was a convicted felon who had been through the process before, including the right to have counsel present.

The state court's findings do not violate any of Petitioner's constitutional rights.

ISSUE III

PETITIONER WAS NOT DETAINED OR SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT THUS THE JANUARY 7th STATEMENT WAS NOT OBTAINED IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS

The Petition for Writ of Certiorari should be dismissed since Petitioner was never seized or detained within the meaning of the Fourth Amendment. Petitioner argues he was detained without probable cause and his statement and physical evidence should have been suppressed. However, the trial court specifically found Petitioner voluntarily accompanied the officers to the police station. See United States v. Williams, 604 F.2d 1102 (8th Cir. 1979). This ruling is supported by the record and is not clearly erroneous; therefore, it should be accepted. United States v. Johnson, 563 F.2d 936 (8th Cir. 1977)

This Court said in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2044, 36 L.Ed.2d 854 (1973) the surrounding circumstances must be concerned in determining if a Fourth Amendment seizure or detention has occured. Accord State v. Grant, 392 So.2d 1362, 1364 (Fla. 4th DCA 1981). Factors to be considered include the threatening presence of several officers, display of weapons, some physical touching of the citizen and use of language or tone compelling compliance with the request.

Sub judice, the evidence revealed two officers - Leake and Stelljes - actually approached Petitioner at his vehicle, although an officer in a marked car effectuated the stop. However, Petitioner voluntarily exited the car; he was not ordered but by the officers. No guns were drawn, nor was Petitioner handcuffed. Petitioner was asked, not ordered, to come to the police station, and the officers made no threats. And there is no evidence of any physical touching by the officers. The officer specifically told Petitioner he did not have to come to the station. And once there, it was made clear to Petitioner he could leave at any time. And in fact Petitioner was allowed to

leave when he indicated he wanted to.

Although there was some contradictory testimony concerning the retention of Petitioner's driver's license and the number of officers, the trial court was faced with credibility determinations. The judge actually heard the evidence and assessed the weight and believability of witnesses. The judgment of the trial court should not be disturbed since it is supported by competent evidence. Oregon v. Bradshaw, supra.

ISSUE IV

THE SEIZURE OF PETITIONER'S VEHICLE WAS BASED ON PROBABLE CAUSE THUS THE PHYSICAL EVIDENCE OBTAINED FROM THE VEHICLE WAS PROPERLY ADMITTED

At the time Petitioner's vehicle was seized law enforcement officers has probable cause to believe a search of the vehicle would yield evidence of a crime. The police had received an anonymous caller saying the car involved had license number GMU 603. A check of the number indicated Petitioner owned that vehicle. Petitioner's background had been checked revealing a prior murder of a female who had been choked and battered and left nude. The police believed from crime scene evidence that the victim had been beaten elsewhere, and the body brought to the beach. A barmaid at the ABC Lounge stated Petitioner left the bar with the victim the night before the body was found. Additionally, Officer Long observed sand on the car floor and dark stains on the seat.

Based on these factors Long had probable cause to seize the vehicle. Chambers v. Maroney, 399 U.S.42, 90 S.Ct. 1975, 26 L. Ed.2d 419 (1970) In Chambers the Supreme Court held given probable cause the officers could either seize the car until there has been judicial determination of probable cause (search warrant) or carry out an immediate search without a warrant. Accord

United States v. Fultz, 622 F.2d 204 (6th Cir. 1980) and United States v. Brown, 635 F.2d 1207 (6th Cir. 1980).

Since Chambers v. Maroney decision our Courts have recognized a less stringent standard than probable cause for seizure - detention - of personal property. The Seventh Circuit in United States v. Klein, 626 F.2d 22 (7th cir. 1980) held the detention of personal property analogous to a Terry detention of an individual; therefore, the applicable standard for such detention is reasonable suspicion. The Court based its ruling on the Supreme Court case of United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970).

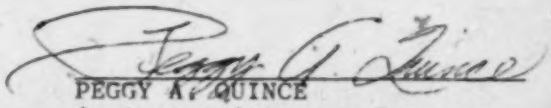
In this instance there was not only reasonable suspicion but also probable cause to seize Petitioner's personal property, the vehicle. Since Petitioner's constitutional rights were not violated, the evidence obtained as a result of the search was properly admitted.

CONCLUSION

The Petition for Writ of Certiorari should be denied since his constitutional rights were not violated.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

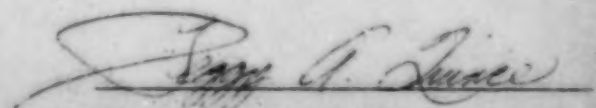


PEGGY A. QUINCE
Assistant Attorney General
1313 Tampa Stree, Suite 804
Park Trammel Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to James C. McKay, Esq., 1201 Pennsylvania Ave., N.W., Post Office Box 7566, Washington, D.C. 20044 on this 25th day of August, 1983.



Of Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Appellant,

v. Case No. 59,765

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
FOR PINELLAS COUNTY, FLORIDA

BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Appellee

PAQ/jmf

Appendix I

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ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE FOUND IN THE CAR AND STATEMENTS MADE BY APPELLANT SINCE HE WAS NOT ILLEGALLY DETAINED ON JANUARY 7, 1980.

Appellant concedes and the evidence supports the conclusion that appellant was not arrested on January 7, 1980. Officer Murry, testifying at the suppression hearing, indicated she had other officers who were keeping appellant under surveillance stop him and ask him to come to the police station for questioning. (R454) She specifically stated no directive was given to arrest appellant. (R454) Both Officers Leake and Stelljes testified appellant was told he was not under arrest. (R529, 533, 562) And appellant acknowledged same. (R539)

The question presented here is whether appellant voluntarily appeared at the police station or was his appearance the result of coercion. Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 60 L.Ed.2d 824 (1979), and United States v. Mendenhall, 446 U.S. 554, 100 S.Ct. 1870 64 L.Ed.2d 497 (1980) Appellant testified after he was stopped by the officers, he was asked to produce his drivers' license, and upon request the officer would not return the license. (R539-540) He

stated the officers did in fact ask him to come to the police station (R539), and he never indicated he would not go (R545). However, appellant also said he was not told the purpose for going to the station, and he was escorted to the station by no less than four marked and unmarked police cars. (R539-540) Appellant stated he went to the police station to get his license back. (R541, 544, 547)

The testimony of Officers Leake and Stelljes is contradictory in certain aspects. Both testified appellant was told the reason they wanted him to go to the station. Furthermore, appellant was told he did not have to come to the police station, although the officer stressed its importance. (R529, 533, 562) Officer Stelljes did ask to see appellant's license; however, appellant agreed to go to the station without anything further being said about the license. (R562-563) The officer had no recollection of appellant asking for the license back. (R563) And contrary to appellant's assertion of being "kind of boxed in", Officer Leake stated appellant followed a police cruiser to the station, and he and Stelljes followed in their respective unmarked vehicles. (R529-530)[1]

1. This case is factually distinguishable from Dunaway. In Dunaway the petitioner was taken from a neighbor's house to a police car and transported to the police station. He was never told he was free to leave and would have been restrained had he attempted to go.

The Fourth District in State v. Grant, 392 So.2d 1362 (Fla. 4th DCA 1981), citing from Scheckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), indicated all the surrounding circumstances must be viewed to determine if a person has been detained or seized within the meaning of the Fourth Amendment. Some factors to consider would be the (1) threatening presence of several officer, (2) display of weapons, (3) some physical touching of the citizen and (4) use of language or tone of voice compelling compliance with the officer's request. Grant, at 1364-1365.

Sub judice, the evidence revealed two officers - Leake and Steiljes - actually approached appellant at his vehicle, although an officer in a marked car effectuated the stop. However, appellant voluntarily exited the car; he was not ordered out by the officers. No guns were drawn, nor was appellant handcuffed. (R544) Appellant was asked, not ordered, to come to the police station, and the officers made no threats. (R545) And there is no evidence of any physical touching by the officers. The officer specifically told appellant he did not have to come to the station. And once there, it was made clear to appellant he could leave at any time. And in fact appellant was allowed to leave when he indicated he wanted to. (R554, 556-557)

Since appellant and the officers gave contradictory testimony concerning the retention of the driver's license, the purpose for the request and the number of officers involved,

the Court was faced with a credibility determination. That question of credibility was obviously resolved in favor of the officers. As the Ninth Circuit said in United States v. Williams, 604 F.2d 1102 (8th Cir. 1979), "...implicit in the denial of the motion to suppress a finding by the trial court that, ..., appellant voluntarily accompanied the police." And here the trial court made a specific finding of voluntariness. (R580) This finding by the trial court is supported by the record and is not clearly erroneous and thus should not be disturbed on appeal. United States v. Johnson, 563 F.2d 936 (8th Cir. 1977)

ISSUE II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE FOUND IN THE VEHICLE AS THE POLICE HAD PROBABLE CAUSE TO DETAIN THE VEHICLE

Appellee respectfully submits that the information available to the police officers and the "open view" observation of the stains and saad in the vehicle gave the police probable cause to seize appellant's car. Prior to appellant's arrival at the police station, the following facts were known to Detective Long:

(1) Detective Long knew the police were investigating the homicide of a young female found at the beach on the early morning of January 3, 1980.

(2) He had heard the tape wherein an anonymous caller indicated the license involved in the homicide was GMU 603.

(3) Long was aware that a check of the vehicle registration revealed appellant was the owner of said vehicle.

(4) A police check of appellant indicated appellant was on life parole for the homicide of a female in New York.

(5) Detective Long also knew the prior murder was similar in a number of respects to the homicide under investigation, i.e. sexual overtones, both victims choked and battered and left nude.

(6) Investigation at the crime scene indicated the victim had been murdered elsewhere and the body dragged to the water.

(7) A barmaid at the ABC Lounge had positively identified appellant as the person the victim left the bar with on the night of January 2, 1980.

On the evening of January 7, 1980 Detective Long was in a place where he had a right to be and observed a vehicle, on a public street, which he knew was the subject of police investigation.

The viewing by Officer Long from outside of the vehicle into the inside was an "open view" observation as defined by the Supreme Court in Ensor v. State, ___So.2d___(6/5/81 F.L.W. 374, Case No. 57,817, Opinion filed June 4, 1981) The Court in Ensor indicated if a officer sees contraband or evidence in "open view", he had probable cause to believe a crime has been or is being committed.

Sub judice, based on the factors listed above, coupled with the officer seeing sand (victim was found on a beach) and seeing what appeared to be dark blood stains (evidence at beach led police to believe the victim was killed elsewhere and transported to the beach), Officer Long has probable cause to seize the vehicle. The seizure of the vehicle comports with the dictates of Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L.Ed.2d 419 (1970). In Chambers, the Supreme Court held given probable cause the officers could either seize the car until there has been judicial determination of probable cause (search warrant) or carry out an immediate search without a warrant. Accord United States v. Fultz, 622 F.2d 204 (6th Cir. 1980) and United States v. Brown, 635 F.2d 1207 (6th Cir. 1980).

Since the Chambers v. Maroney decision our Courts have recognized a less stringent standard than probable cause for seizure - detention - of personal property. The Seventh Circuit in United States v. Klein, 626 F.2d 22 (7th Cir. 1980) held the detention of personal property analogous to a Terry[2] detention of an individual; therefore, the applicable standard for such detention is reasonable suspicion. The Court based its ruling on the Supreme Court case of United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970)

In Van Leeuwen, supra., a postal clerk became suspicious after receiving two first-class packages, weighing twelve pounds, registered and insured for $10,000.00. The packages were addressed to post-office boxes in Van Nuys, California and Nashville, Tennessee and the return address on each was a vacant housing area. Additionally, the person mailing the packages had been driving a car with a Canadian license. Based on these facts the Court upheld the detention of the packages pending further investigation and issuance of a search warrant. See also United States v. Goldstein, 626 F.2d 356 (5th Cir. 1981) and United States v. Viegas, 639 F.2d 42 (1st Cir. 1981) holding reasonable suspicion sufficient to detain personal property. See also Judge Hurley's concurring opinion in State v. Corey, 389 So.2d 1228 (Fla. 4th DCA 1980) which cited Van Leeuwen and Klein, supra.

2. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)

The trial court properly denied appellants Motion to Suppress the evidence found in the vehicle since the police had probable cause to detain the vehicle.

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS THE STATEMENTS MADE BY APPELLANT AFTER HE WAS ARRESTED AND BOOKED

Although not cited by appellant, this case presents a direct, distinguishable contrast to the Supreme Court's most recent exposition on the scope of Miranda.[3] Edwards v. Arizona, 29 Cr.L. 3037 (Decided May 18, 1981). The petitioner in Edwards was arrested and informed of his Miranda rights on January 19, 1976. He indicated he understood said rights and was willing to answer questions. Edwards was told he had been implicated by another suspect, but he denied any involvement and sought to make a deal. After being told by the police that they had no authority to negotiate, petitioner invoked his right to counsel, and the police ceased their questioning.

On the morning of January 20th two other detectives asked to see petitioner. Edwards said he did not want to talk with anyone but was told he had to. He was again informed of his rights and made a statement implicating himself. The trial court denied Edwards motion to suppress holding the statement was voluntary. On these facts the Supreme Court reversed holding a waiver of counsel must not only be voluntary but must also be a knowing and intelligent relinquishment

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3/ Miranda v. Arizone, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed.2d 694 (1966)

of a known right. Additionally, the court held in situations where a defendant expresses his right to deal with the police only through counsel, he is not subject to further questioning until counsel has been made available or the accused initiates further contact with the police.

This case is factual distinguishable from Edwards, supra. The petitioner in Edwards was told on the second day and subsequent to his request for counsel that he "had to talk" to the police officers. Sub judice, when given the opportunity appellant indicated his desire to talk. (R472-473). And in Edwards the defendant specifically said he wanted an attorney before he made a deal and said he did not want to see anyone when told the detectives were there to see him. Here appellant expressed an equivocal - I think - desire for an attorney.

Prior to the decision in Edwards, supra, and appellee submits that decision does not affect these holdings, it was clear that an invocation of the right to counsel was not a blanket prohibition against further interrogation. Michigan v. Moseley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) and Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979). The Fifth Circuit in Nash addressed those situations wherein a defendant makes an equivocal request for counsel. In such a situation officials may make further inquiry to clarify the suspects wishes. Blasingame v. Estelle, 604 F.2d 893 (5th Cir. 1979); United States v. Grullon, 496 F.Supp. 991 (U.S.D.C., E.P. Penn. 1979); Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980)

Sub judice, when appellant was arrested he was informed of his Miranda rights, and he stated he understood his rights. (R470) Detective Hitchcox handed Officer Murry a picture of decedent which was shown to appellant. (R470, 496) Appellant said the picture was Debbie and acknowledged he knew her. (R470-471, 496) At this point appellant said, "I think I want to talk to an attorney...." (R471) No further questions were asked, and appellant was taken to the police station for booking. (R471)

At booking Officers Murry and Hitchcox told appellant they would come up to the fourth floor after he was processed to give appellant the opportunity to talk to them and answer any questions he may have had. The officers indicated they would come if appellant wanted them to and he said he would be interested. (R472-473) Thus, we are faced with the situation contemplated by the court in Nash v. Estelle, supra. - A defendant expressing an equivocal desire for counsel, then exercising his prerogative to answer questions.[4] As the court said in Nash, "Some persons are moved by the desire to unburden themselves to confessing their crimes to police, while others want to make their own assessment of what to say to their custodians." 597 F.2d. 513 at 517.

In Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L. Ed.2d 424 (1977) the Supreme Court indicated the question of

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4/ It appears from the record, however, that the statements made by appellant after booking was not in response to questions proffered by the officers. During the attempt to re-read appellant's rights he responded with statements to the effect that his life was over and nothing he could do would "bring her back". (R473, 1847)

waiver of counsel was to be determined from the fact of each case. The standard to be applied in determining waiver is whether appellant intentionally abandoned or relinquished a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) There can be no doubt that appellant knew and understood his right to counsel and intentionally relinquished same.

On January 7th, two days before appellant was actually arrested,appellant voluntarily went to the police station at the request of the police. Once there he was read and he executed a waiver of rights form which specifically included the right to counsel. (R457-459) And on the day of his arrest, appellant was again informed of his rights and said he understood them. (R469-470, 1845) Appellant emphatically stated he didn't want his rights read again. (R473) Appellant understood anything he said could be brought up in court, but he insisted he wanted to talk to the officers. (R474-476) And when appellant had said all he wanted to say, he told the officers, "I'm kind of tired and I think I want to talk to my attorney." (R477) It is obvious appellant understood his right to counsel and would invoke same whenever he wanted to terminate a conversation.

Even assuming, arguendo, the introduction of appellant's statements of January 9th was error, appellee submits the error was harmless. Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972). In Chapman v. California,

386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) the Supreme Court held the harmless error doctrine can be applied in situations involving the denial of a federal constitutional right. Both state and federal courts have applied the harmless error doctrine to the introduction of statements where the evidence adduced in the statement is cumulative of other and the other evidence of guilt is overwhelming. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979); and Hampton v. State, 386 So.2d 587 (Fla. 3d DCA 1980).

Sub judice, appellant's statements on January 9th are cumulative of other valid statements made on January 10th which were properly admitted.[5] The following evidence of appellant's guilt was introduced at trial:

(1) A barmaid at the ABC Lounge testified appellant left the bar with the murder victim the night before her body was discovered. (R1120)

(2) The police had received an anonymous call giving a license number for the vehicle involved in the bay murder.

(3) A registration check of the license numbers revealed appellant owned the vehicle.

(4) On January 3, 1980 appellant went to work and asked for the day off; his employer noticed red marks or scratches on his face. (R1140)

5/ The propriety of appellant's January 10th statements is discussed in detail in Issue IV of this brief.

(5) Appellant's employer also testified they had conversations concerning sex, more particularly anal sex, and appellant related he liked to slap or beat the women at these times. (R1157-1158)

(6) Defendant washed his car on the day following the murder. (R1251, 1259)

(7) Blood stains were found in appellant's car of the same type as the victim. (R1475-1476)

(8) Although appellant also has Blood Type A, certain enzymes in the blood matched that of the victim. (R1475, 1478-1479)

(9) Judith Bunker, an expert in blood stain patterns, testified the configuration of the blood stains in appellant's car indicated the victim was struck with a hard object while sitting in the passenger seat. (R1579, 1616, 1620)

(10) A luminal test was used to determine that blood stains had at some point been on appellant's jacket and parts of the car but had been cleaned off. (R1544)

(11) Three of the hair samples taken from the car of the accused, when microscopically examined, demonstrated the same hair characteristics as the victim. (R1683)

(12) Lynn Henson from the Department of Law Enforcement testified he compared fiber taken from the seat of

appellant's car to fiber found on the victim's pants and determined they were similar in every characteristic. (R1719-1720)

(13) Additionally, Henson compared fiber from the victim's coat to fiber sweepings found in appellant's car and found no characteristics which would eliminate the fiber from the car as have come from the coat. (R1720-1721)

(14) Appellant's cellmate testified concerning an incident in jail during which appellant stated, "I wonder how he'd like a Coke bottle up his ass like I gave her." (R1794)

(15) Appellant also told the same cellmate his boss was lying about appellant being scratched up because appellant was too scratched up to go to work. (R1787)

(16) When appellant was questioned at the police station on January 7th, he stated he did not know Debbie and knew nothing about a murder. (R1815)

(17) However, on January 9th when appellant was being transported to jail after his arrest, appellant viewed a picture of Debbie Kammerer; he indicated the picture was that of Debbie, and he acknowledged he knew her. (R1817-1818)

This evidence established appellant's guilt of the murder of Debbie Kammerer beyond a reasonable doubt. The jury would

have, based on the other evidence, convicted appellant without introducing these statements; thus, the use of the statements was harmless beyond a reasonable doubt. Milton v. Wainwright, supra.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE ON JANUARY 10th

Appellant contents, citing Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), his statements made on January 10th should have been excluded from evidence because his attorney had not been notified of the interview. This argument is without merit. Massiah involved a post-indictment situation wherein a co-defendant, who unknown to the defendant was cooperating with the police, surreptitious interrogated the defendant. The defendant had no knowledge he was under interrogation by a government agent. The Court in Escobedo recognized (citing Johnson v. Zerbst, supra.) a defendant may under proper circumstances effectively waive his right to counsel, but held on the facts before them no waiver occurred.[6]

Federal and State Courts have recognized, in cases after the Massiah decision, there is no per se violation of the Sixth

6. Escobedo had been arrested and unequivocally requested counsel, and he had been informed of his right to remain silent. The police told the defendant they had convincing evidence against him and urged him to make a statement.

Amendment when a defendant makes incriminating statements in the absence of counsel. United States v. Massey, 437 F.Supp. 843 (U.S.D.C., M.D., Fla. 1977) The Court held the question of waiver or Sixth Amendment violation depends on the facts and circumstances surrounding the interrogation. Likewise, the Seventh Circuit in United States v. Springer, 460 F.2d 1344 (7th Cir. 1972) held there is no per se rule that law enforcement officials must give prior notice to defense counsel before obtaining a statement from an accused. The Court said:

> Springer would first have us affirm as a principle that Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and subsequent cases have made it clear that law enforcement officials cannot procure a statement of any kind from a defendant who has an attorney without at least prior notice to, if not the consent of, the attorney. Although such a rule might seem to follow from a reading of *Massiah* alone, wherein the Court spoke in very broad terms in dicta, we are constrained by precedent both of this court and the Supreme Court to reject this line which admittedly has the value of simplicity in administration, as do all *per se* rules. That a constitutional right, such as the right to counsel, may be waived is not questioned. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L. Ed.2d 977 (1964). Thus, in United States v. Fellabaum, 408 F.2d 220 (7th Cir. 1969), cert. denied, 396 U.S. 858, 90 S.Ct. 125, 24 L.Ed.2d 109, and United States v. Crisp, 435 F.2d 354 (7th Cir. 1970), cert.

> denied, 402 U.S. 947, 91 S.Ct. 1640, 29 L.Ed.2d 116 (1971), this court has affirmed convictions resulting from confessions obtained without the presence of counsel.
>
> (text at 1350)

And in Monroe v. State, 369 So.2d 962 (Fla. 3d DCA 1979) the Third District said:

> It does not follow that all statements made in the absence of counsel are inadmissible; but each case must turn on the facts and circumstances surrounding the particular interrogation. United States v. Brown, 551 F.2d 639, 643-4 (5th Cir. 1977). A valid interrogation of a defendant can take place out of the presence of his attonrey where the defendant knowlingly and intelligently waives his right to have counsel present at some particular critical stage of the proceedings, and further the presence of his counsel is not essential to the validity or effectiveness of that waiver, Johnson v. State, 268 So.2d 544, 546 (Fla. 3d DCA 1972), cert. discharged, 294 So.2d 69 (1974). The voluntariness of in-custody statements of persons accused of a crime and of the waiver of the right to counsel at an interrogation need only be established by a preponderance of the evidence. Johnson v. State, 294 So.2d 69 (Fla. 1974), supra.
>
> (text at 964)

Thus the fact that counsel had been appointed for appellant and the police knew of the appointment before their meeting with appellant does not per se require suppression of the statement.

ISSUE V

THE TRIAL COURT DID NOT EER IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS AS THE STATEMENTS WERE MADE VOLUNTARILY

Appellee would point out that appellant never raised the issue of voluntariness of his statements; therefore, the issue has not been preserved for appellate review. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (L977) In Wainwright the Court held that a trial court need not hold a hearing on voluntariness of statements and/or confessions unless the defendant objects on that bases. Accord United States v. Wertz, 492 F.Supp. 1027 (U.S.D.C., D.S.C. 1979). And our Supreme Court in Brewer v. State, 386 So.2d 232 (Fla. 1980) also indicated the Court need only determine if a statement was free and voluntary if a question on voluntariness arises. Additionally, appellant did not object when the trial court ruled the statements voluntary.

Appellant made three (3) pre-trial motions to suppress. The first motion pertained to statements made by appellant on January 7, 1980, and the basis for said motion was that the statements were the result of an illegal detention. (R307-309) The second motion pertained to physical evidence seized from appellant's vehicle and the results of tests done to the physical evidence. (R310-312) The third motion concerned the statements made by appellant on January 9th and 10th. The legal

arguments in support of this motion were: (1) appellant's arrest was a result of illegally seized evidence and the statements were "fruits of the poisonous tree", (2) the statements were obtained after appellant had requested counsel, and (3) the January 10th statement was obtained without the permission or knowledge of appellant's counsel. (R313-314)

After testimony was received at the hearing, defense counsel argued in support of his motions asserting the same grounds espoused in his motions. (R564-575) And the prosecutor likewise made no argument on the voluntariness of the statements. However, at the close of the arguments, the trial judge made a ruling that the statements were freely and voluntarily made. (R580) No objection was made to that ruling.

Prior to admission of the statements at trial, the following colloguy occurred between the parties:

> MR. HELINGER: Your Honor, for time's sake I would inquire of the Court -- During the motion to suppress before Judge Patterson we went through the specifics; the Court found the statement freely and voluntarily made at that time.
>
> Do you want me to go --
>
> MR. SCHERBER: I think we have to go through all the statements as far as legal relevance. That's the only purpose for this proffer to my understanding.
>
> THE COURT: No question of voluntariness?
>
> MR. SCHERER: I think that has been permitted.

> MR. WHITE: I believe, well, that during -- In fact, we know during the course of our motion to suppress that previous judge found as a matter of law that there was voluntariness and Miranda rights, et cetra, had been properly put to the defendant before his questioning. Hence we are not trying to create an error with the Court, but it would be our opinion that that is res adjudicata or whatever you call it.
>
> MR. SCHERER: And that aspect need not be looked into, but, very simply, I object to him going back to statements which are not relevant.
>
> THE COURT: All right. (R1813-1814)

Again no objection was made to the evidence for lack of voluntariness; appellant's argument was confined to its relevancy.

Since appellant never objected to the admission of the statements based on involuntariness, he cannot now be heard on that issue. Wainwright v. Sykes, supra. Appellant had two opportunities to impose any objection - when the trial judge made his sua sponte ruling and again when the issue came up during Detective Murry's proffered testimony.

Talking rationally during booking he cooked. (R472
Did not appear under influence of drugs or alcohol (R472)
aware of what occurring (R472)
Not threatened or coerced.
Told anything he said could be used in court.
Did not guess what appellant said.

ISSUE VI

THE TRIAL COURT'S ADMISSION OF EVIDENCE OF MARIJUANA IN APPELLANT'S CAR IS NOT REVERSIBLE ERROR

Appellee respectfully submits this Court's ruling in Malloy v. State, 382 So.2d 1190 (Fla. 1979) is dispositive of this issue. In Malloy co-defendants who had entered negotiated pleas, testified to an incident involving a rifle at a lounge which occurred some hours prior to the murders. This Court held the incident at the lounge was only one incident in a chain of events culminating with the delivery of the property to appellant's bedroom. The Court also said:

> In addition, the circumstances of the lounge incident do not establish all the elements of a crime and, consequently, the question of the admissibility of prior criminal acts is not present.

Sub judice, during appellant's statements to the police, he indicated he had a problem with alcohol and also used marijuana. (R1848) Officer Ehlers testified concerning the items taken from appellant's car, which included several baggies of marijuana. (R1364) This was the only evidence introduced at trial concerning drugs, and as this Court said in Malloy, supra., this evidence does not establish all the elements of a crime; therefore, the question of other criminal acts does not arise.

Ore incident in a lengthy trial.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF AN ATTEMPTED HOMOSEXUAL ASSAULT BY APPELLANT WHILE HE WAS IN JAIL AWAITING TRIAL.

Joan Wood, a medical examiner for Pinellas County, testified to the presence of semen in the rectum of the victim. (R1037) Additionally, she testified there was evidence of mutilation of the rectum, suggesting penetration by a foreign object. (R1038-1039) The nature and extent of the rectal injuries were consistent with the type of injuries likely to be received from insertion of a coke bottle into the rectum. (R1039) A coke bottle was found in appellants' car.

The testimony of Kenneth Young, appellants' cellmate, was offered to introduce an admission made by appellant during his incarceration. See Darty v. State, 161 So. 2d 864 (Fla. DCA 1964). Appellant made the statement, "I wonder how he'd like a Coke bottle up his ass like I gave her." (R 1794)

At a motion in limine hearing concerning the admission into evidence of the statement, the court ruled:

> THE COURT: Yeah, but I think it comes in under statement against interest. I think he has the right to show the facts that prompted that statement. If it contains the evidence of another crime, so be it. (R 871)

Thus the trial court held the statement was relevant as an admission against interest.

This Court said in Smith v. State, 365 So. 2d 704 (Fla. 1978) that Williams Rule evidence was admissible if relevant for any

purpose except to show bad character or criminal propensity. The medical evidence demonstrated the victim had been rectally assault with a foreign object consistent with a Coke bottle. Appellant during the course of an attempted assault in essence admits he used a Coke bottle on the murder victim. It is unreasonable to assume the jury could appreciate the significance of such a remark without knowing the context in which it was made. Was the jury to surmise that appellant out of the blue made reference to his sexual assault on Debbie Kammerer?

The trial court properly ruled the testimony of Young was admissible to establish the context in which appellants' admission was made. *cf.* Ruffin v. State, ____So. 2d ____(Fla. 1981, Case Nos. 55,684 and 56,741, Opinion filed March 26, 1981).

ISSUE VIII

NO REVERSIBLE ERROR HAS BE SHOWN BY THE TRIAL COURTS FINDING THAT THE MURDER WAS COMMITTED TO AVOID OR PREVENT A LAWFUL ARREST.

The evidence before the jury in support of this aggravating circumstance is the type of "strong" evidence suggested in Riley v. State, 366 So. 2d 19 (Fla. 1979). The following evidence supports this finding:

(1) The victim was sexually assaulted and battered prior to the murder.

(2) Appellant was on life-time parole from a previous murder.

(3) The evidence indicated the victim had been murdered elsewhere, and the body taken to the beach for disposal.

(4) During appellants January 10th statement he indicated, " You do what you can to protect Bobby Waterhouse. No one wants to go to jail." (R 1854)

In Washington v. State, 362 So. 2d 658 (Fla. 1978) this Court considered as a factor in determining the murder was committed to avoid arrest that the defendant had hidden the body by burial in his back yard. And in Dobbert v. State, 375 So. 2d 1069 (Fla. 1979) this Court considered the fact that as long as the victim was alive she was living proof of the abuse he had inflicted on her body. Subjudice, we have the additional factors that appellant was on life-parole, which would have been revoked had his sexual abuse of the victim become known and that appellant said he had to protect Bobby Waterhouse from jail.

Appellee submits these circumstances affirmative demonstrate

the murder was committed to avoid arrest.

Even assuming, arguendo, the evidence was insufficient to support this aggravating factor, there were no mitigating circumstances found. And there are several well-founded aggravating circumstances. This Court has on numerous occasions held when there are no mitigating circumstances and good aggravating circumstances, imposition of the death penalty is appropriate. Elledge v. State, 346 So. 2d 998 (Fla. 1977); Washington v. State, supra.; and Antone v. State, 382 So. 2d 1205 (Fla. 1980).

ISSUE IX

THE EVIDENCE SUPPORTED A FINDING THAT THE MURDER WAS HEINOUS, ATROCIOUS OR CRUEL.

The medical exmainer's description of the nature and extent of abuse to the victim's body was as follows:[7] There were 30 lacerations and 36 bruises over the body which had been inflicted prior to her death. The rectum displayed evidence of mutilation by multiple tearing wounds. Scientific evidence indicated the victim had been anally assaulted with a penis and a foreign object. Based on the amount of hemorrhaging in the rectal area, the mutilation of the rectum occurred prior to the victim's death. The victim's right eye was bruised and blackened and there were multiple injuries to the face. A bloody tampon had been stuffed in Debbie's mouth in such a manner as to prevent her from crying out or screaming. A front tooth was missing and there was evidence indicating this had recently happened. The medical evidence also indicated the victim had been choked to such an extent as to cause hemorrhages in the eyes, lining of the voice box and muscles of the neck.

The prosecutor described the heinous, atrocious or cruel circumstances thusly:

7/A complete description of the injuries to Debbie Kammerer's body is contained in record pages 1036-1060.

It's hard to consider anything more. The strangulation to the point that the blood vessels burst in the eyes, the thirty lacerations to the head, the defense wounds. If you all remember, and it's not fun to go back and think about, but it's necessary that you do so, you saw her hands, the cuts, the bruises, and it's very, very easy, although not pleasant, to think about the fight that that ninety-pound woman must have put up that particular night when she knew the handwriting on the wall, when she knew what she was dealing with that night.

Cruel, was it? Cruel means designed to inflict a high degree of pain. Did Debbie Kammerer suffer that night? She wasn't dead until after she was dragged into the water. Did she suffer? The defense wounds themselves indicated that she was suffering trememdously. It's not one little thing there and then she'd be out cold. The woman had to have fought for an extended period of time. The physical evidence and the testimony of the medical examiner, Dr. Wood, indicate that beyond any reasonable doubt.

Cruel, utter indifference to or enjoyment of the suffering of others, pitiless. Is Robert Waterhouse pitiless? Absolutely. To mutilate sexually the way he did that woman, the choking, the thirty-six bruises, it's not just hitting her thirty times with an object. There's thirty-six more bruises, again all over the hands, such an indicating to you what a struggle took place. The inside of that car, the blood all over, splattering everywhere, indicates the force with which she was hit as she's struggling that night. She's alive during the whole incident until she's dragged into the water. Can there be any doubt in anyone's mind, more or less any reasonable doubt, that this crime was especially heinous, atrocious, or cruel? Absolutely that applies.

(R. 2282-2284).

The actions of Appellant certainly meet the definition of heinous - extremely wicked or shockingly evil - atrocious -

outrageously wicked and vile - and cruel - designed to inflict a high degree of pain - as outlined by this Court in State v. Dixon, 283 So.2d 1 (Fla. 1973). See also Dobbert v. State, supra.

The evidence in Halliwell v. State, 323 So.2d 557 (Fla. 1975) was that the victim was murdered then the body was mutilated. That situation is not applicable here. The medical examiner stated the wounds to Ms Kemmerer's body were inflicted prior to her death by drowning, and the defense wounds indicate the victim was conscious and aware of what was happening.

ISSUE X

THE TRIAL COURT DID NOT ERR IN FINDING TWO AGGRAVATING FACTORS BASED ON APPELLANT'S PRIOR MURDER CONVICTION

Sub judice, the trial judge found as two aggravating factors that the murder was committed while Appellant was under a sentence of imprisonment, i.e. lifetime parole for second degree murder in New York and Appellant had previously been convicted of a felony involving force. This is the identical situation presented in Adams v. State, 341 So.2d 765 (Fla. 1976), and this Court gave no indication that this was improper.

Appellee submits Appellant has misapplied the concept of improper doubling. The decision in Provence v. State, 337 So. 2d 783 (Fla. 1976) more correctly indicates there is doubling when two aggravating circumstances necessarily flow from the same aspect of a defendant's conduct. Thus with a murder committed during a robbery there would always be two aggravating circumstances.

In this instance, the two aggravating factors would not necessarily be present simply because a person had been convicted of a previous forceful felony. A defendant could have been convicted of a forceful felony and completed his sentence prior to the felony presently being adjudicated.

ISSUE XI

THE FACT THAT THE MURDER WAS COMMITTED DURING THE PERPETRATION OF A SEXUAL BATTERY WAS PROPERLY FOUND TO BE AN AGGRAVATING CIRCUMSTANCE.

Appellant has again misapplied the law as pronounced by this Court in a number of cases. The holding in State v. Pinder, 375 So. 2d 836 (Fla. 1979) was that in a felony murder situation a defendant could not receive a separate judgment and sentence for the murder and the underlying felony. Appellant herein seeks to extent that ruling to say that in any felony-murder scenario the underlying felony cannot be used as an aggravating circumstance. This is simple not the law in this state.

This Court has on numerous occasions held the felony-murder context a proper aggravating factor. Ford v. State, 374 So. 2d 496 (Fla. 1979); Smith v. State, supra.

No error has been demonstrated.

CONCLUSION

Based on the foregoing arguments and authorities the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

JIM SMITH
ATTONREY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Philip J. Padovano, Esquire, Post Office Box 873, Tallahassee, Florida 32302 on this 19th day of June, 1981.

Of Counsel for Appellee

IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Appellant,

vs.

CASE NO. 59,765

STATE OF FLORIDA,

Appellee.

APPELLANT'S BRIEF

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Florida 3230[illegible]
(904) 224-3636

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES

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STATUTES AND OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Record on Appeal consists of twelve bound volumes and will be cited throughout this Brief by the letter "R" and the appropriate page number.

The Appellant, Robert Brian Waterhouse, will be referred to as the Defendant and the Appellee, State of Florida will be referred to as the State.

STATEMENT OF THE CASE

This is an Appeal from a Final Judgment of the Circuit Court for Pinellas County, Florida, adjudicating the Defendant guilty of the crime of First Degree Murder and sentencing him to die in the electric chair. (R-394).

On January 31, 1980, the Pinellas County Grand Jury met and returned an Indictment charging the Defendant with the premeditated killing of one Deborah Kammerer. (R-16,17). The charge alleged that on January 3, 1980, the Defendant beat and choked the victim inflicting wounds upon her, and that he then dragged her into the water where he left her to drown. (R-16, 17). A plea of Not Guilty was entered (R-16,35), and the case was set for trial.

Counsel for the Defendant made a variety of challenges to the constitutionality and constitutional applicability of the Florida capital punishment laws, (R-24,34) but each of the arguments was rejected by the Trial Court Judge. (R-80).

Prior to trial, the Attorneys for the Defense moved to suppress certain items of tangible evidence recovered from the Defendant's automobile on or after January 7, 1980, as well as a series of statements made by the Defendant to officers of the St. Petersburg Police Department on January 7th and 10th. (R 307-314).

The trial judge conducted a separate evidentiary hearing on the Motion to Suppress on August 22, 1980 (R-435,581) at the close of which he denied the Motion in part and granted it in part, ordering the exclusion of only the final statement made by the Defendant on January 10, 1980. (R-388,579,580) The State moved for a rehearing on the portion of the Order requiring the exclusion of the last statement (R-339,341) and on August 25, 1980, the Lower Court reversed its earlier ruling and entered an Order denying that part of the Motion as well. (R-411,412,432).

The Defense also filed a Motion in Limine seeking to exclude certain "Williams Rule" testimony regarding an allegedly similar act committed by the Defendant while he was incarcerated in the Pinellas County Jail. (R-305). The Court reserved ruling on this Motion until such time as the State offered the disputed testimony at trial. (R-872).

Trial commenced in St. Petersburg on August 25, 1980, and the tangible evidence and statements challenged by the Defense were presented to the Jury over the renewed objection of counsel. (R-991). The trial judge also allowed the State to present the similar fact evidence previously challenged by the Motion in Limine. (R-1753).

The presentation of the testimony and evidence relating to the first phase of the trial was concluded on August 31, 1980, and on September 2, following the arguments of counsel and instructions by the Court, the Jury returned a verdict of guilty as charged. (R-389). The sentencing phase of the trial began the next day, and after consideration of the testimony and argument relating to that proceeding, a majority of the jury recommended the imposition of the death penalty. (R-390).

A Defense request for a presentence investigation was denied (R-2300) and the Defendant was sentenced shortly after the advisory penalty proceedings. The trial court judge accepted the recommendation of the Jury and sentenced

the Defendant to death (R-2305). Thereafter, on September 15, 1980, the Court entered written findings of fact in support of the sentence. (R-408,409).

This appeal was timely filed on September 30, 1980, to review the Judgment and Sentence of the Circuit Court for Pinellas County, Florida. (R-417).

STATEMENT OF THE FACTS

A

THE MOTIONS TO SUPPRESS

On the morning of January 3, 1980, Sergeant Gail Murry responded to a call concerning the discovery of a body near the shoreline in the Lassing Park area of the city of St. Petersburg. (R-444). When she arrived at the scene, she found the naked body of a white female lying face down in the mud about twenty feet from the high tide mark. (R-445).

Sergeant Murry noticed that the victim had severe lacerations in the head and scalp area, and as she turned the body over, she discovered that the victim had numerous bruises around the throat area, a swollen black right eye, and what appeared to be a blood soaked tampon in her mouth. (R-445). An examination of the entire Park area led Murry and other officers called to the scene, to the conclusion that the assault had occured elsewhere and that the body was transported to the scene and dragged into the water. (R-446).

On January 5, 1980, the St. Petersburg Police Department received an anonymous phone call from a person with a New England type accent who said "In reference to the bay murder, I have a license number for you GMU-603", and then hung up. (R-447). Sergeant Murry was able to determine from the information provided that the vehicle referred to was a brown 1973 Plymouth registered in the name of the Defendant Robert Brian Waterhouse.

(R-448).

A records check disclosed that the Defendant Waterhouse was on lifetime parole for the homicide of a white female victim in New York. (R-449). Sergeant Murry learned upon further investigation that the victim in that case had been choked and left nude. (R-449).

The officers were able to determine that the Defendant's local address was 1675 Pinellas Point South, and immediately commenced a surveillance of the residence and of the Defendant. (R-450). On January 7, 1980, while the police surveillance was apparently still in progress, a missing persons report demonstrated that the victim was one Deborah Kammerer who had lived on Grove Street in the city of St. Petersburg. (R-450).

Miss Kammerer was last seen by her friends, Yohan Wenz and Carol Byers, at the ABC Lounge on Fourth Street on the evening of January 2, 1980 (R-451). The three had gone to the lounge that night together, but Wenz and Byers left shortly before midnight. (R-451). Miss Kammerer indicated to them that she wanted to stay a little longer. (R-451).

The officers then proceeded to the ABC Lounge where they spoke with an oriental bartender named Kyoe Ginn. (R-452). They showed the bartender a photograph of Deborah Kammerer, and she said that she knew her as a patron of the lounge. (R-452). Ms. Ginn told the officers that Miss Kammerer was in the bar on the evening of January 2, 1980, and that she left with a man shortly after midnight. (R-452).

The bartender was then shown a group of photographs including the photograph of the Defendant Waterhouse, and she picked out the photograph of the Defendant and said that he was the man she saw leaving the lounge on January 2, 1980 with Miss Kammerer. (R-452). She recognized Waterhouse as a customer of the lounge as well. (R-452).

Sergeant Murry then decided to interview the Defendant's Aunt and Uncle,

Mr. and Mrs. Foster, and a family friend, Mr. Ken Norwood, each of whom lived in the same house with the Defendant. (R-453). She asked the three of them to come to the police station for questioning, and when they arrived, he noticed that they each had a New England accent similar to the accent of the voice on the tape of the anonymous phone call. (R-453).

The Fosters were described by Sergeant Murry as uncooperative. (R-454). They told her that they did not know what the Defendant Waterhouse was doing on the evening of January 2, 1980, and that he would generally just come and go as he pleased. (R-454). Mr. Norwood, however, told the officers that the Defendant was an oversexed person with a Jekyll and Hyde personality and that he felt that he was capable of committing a crime such as the one which was committed. (R-454).

At this point, the officers decided that they would ask Mr. Waterhouse to come to the police station for questioning. (R-455). On the evening of January 7, 1980, Detective William Leake and Detective Richard Stelljes, both of the St. Petersburg Police Department, observed the Defendant driving his 1973 Plymouth in the vicinity of Twentieth Avenue and Sixteenth Street North. (R-528). They signaled for him to pull over to the side of the road so that they could speak with him. (R-528).

Detective Leake testified that Detective Stelljes asked the Defendant Waterhouse for his driver's license, which he produced and that he then told him they were investigating a homicide and that they would like for him to come down to the police station. (R-529). As it was related by the officer, the Defendant was told that it was important that he come down to the station, but that he did not have to. (R-529,530). According to Detective Leake, the Defendant Waterhouse followed them down to the police station voluntarily. (R-530). He reportedly followed Detective Stelljes, driving in his own car alone, while Detective Leake rode back in another police car which had arrived at the

scene in the meantime. (R-530).

Mr. Waterhouse, who took the witness stand on his own behalf at the hearing on the Motion to Suppress, testified that the only reason he followed the officers to the station was that they did not give him his driver's license back. (R-540). He said that he asked the officer to give him his license back at the scene of the stop and that the officer said "Well, you will have to go to the police station to get it back." (R-540).

The Defendant testifed that there were at least four police cars that accompanied him to the police station and that he was boxed in among the cars. (R-540). After he arrived at the station, and spoke with the officers there, they would not give him the license or his car. (R-541, 542). He said that he would not have gone to the police station if it were not for the fact that the officers had his license. (R-542).

The Defendant's testimony regarding the license is supported in part by the testimony of both Detective Leake and Detective Stelljes. Detective Stelljes, called in rebuttal by the State, testified that Mr. Waterhouse never asked him for his license back. (R-453). However, Stelljes was not asked (nor did he volunteer) to give testimony that he actually gave the license back. Moreover, Detective Leake testified that he did not observe Detective Stelljes giving the license back at the scene of the stop. (R-533).

Sergeant Murry told the Court that when the Defendant arrived at the station she advised him of his rights and he executed a written waiver. (R-456-459). At that time, he denied commission of the offense and said that he did not know Deborah Kammerer. (R-1815). The officer said that she told Waterhouse that he was free to leave at any time. (R-460, 461). In response to that he indicated to her that he wanted to leave and was permitted to do so. (R-461). The officers conceded, however, that they did not allow him to take his vehicle with him. (R-462).

While the Defendant was talking to Sergeant Murry, Detective John W. Long was conducting a visual inspection of the 1973 Plymouth from the outside. (R-511). He looked into the vehicle with a flashlight and observed some sand on the floor in front of the driver's seat and what appeared to be several dark stains on the floor directly behind the driver's seat. (R-512). Based upon this information, he applied for and obtained a search warrant to search the vehicle. (R-513,514). The automobile was detained by the police, against the Defendant's will, (R-489) continuously from the time he appeared at the station until the search warrant was actually signed at five a.m. on the morning of January 8, 1980. (R-513,514).

The search of the automobile disclosed that it contained blood stains of type A blood, the same type as the blood of Deborah Kammerer. (R-466,467). Based upon that information, police officers obtained an arrest warrant for the Defendant on the afternoon of January 8, 1980 and arrested him the next day. (R-466,467).

Sergeant Murry and Detective Hitchcox, who made the arrest, advised the Defendant of his rights in the police cruiser on the way to the station and when they asked him if he wished to speak to them he gave no answer. (R-470). They drove for a few minutes, after which Detective Hitchcox held up a picture of Deborah Kammerer and asked the Defendant if he knew her. (R-470). According to Sergeant Murry, he said "Yes that's Debbie", to which she responded, "Oh well, then you do know her." (R-470,471). Detective Hitchcox said, referring to the earlier interview, "We were right, weren't we, about what happened Wednesday night?", to which the Defendant simply said, "Might." (R-471). Following these brief conversations, Mr. Waterhouse was reported to have said, "I think I want to talk to an attorney before I say anything else." (R-471).

During the booking, the officers indicated that they wanted to speak with

the Defendant in more detail a little later, and he seemed to them to be cooperative and interested. (R-472). The following morning, on January 10, 1980, at two a.m., Sergeant Murry and Detective Hitchcox went to the fourth floor of the jail to speak with him. (R-473). They said that he appeared to be saddened and that when they attempted to read him his rights again, he said that he didn't want his rights, that it was over, and that he was going to the chair. (R-473).

Sergeant Murry said that the Defendant was getting "very upset" and saying in response to the rights form, "I don't want to hear them - my life is over." During the several hours the officers were there, the Defendant would at times start crying and he told the officers that he wanted to talk to them as people and not as police officers. (R-473). He finally said, "You know I'm tired, and I think that I would like to talk with my lawyer, will you all come back later tomorrow", and the interview was ended. (R-477).

The following morning, the Defendant went to an advisory hearing, after which he was interviewed for several hours by a representative from the Public Defender's office. (R-478). The police officers knew the Public Defender's office had been appointed on the case, and that a representative of the office had conferred at length with the Defendant around noon of January 10, 1980, but went to see him later that afternoon[1], without contacting anyone in the Public Defender's office. (R-499,500).

During that interview, the Defendant told the officers that he did not want to confess, (R-479) and that he did not want to talk about the offense (R-500,501), and once again told them that he just wanted to talk to them as

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[1] Sergeant Murry, during direct examination, said that this interview occurred on January 11, 1980, see e.g. R 479,489), but it is apparent from the cross examination during the Motion to Suppress (R-501,502) and the trial testimony (R-1819) that the interview actually occurred on the 10th.

people. (R-479). He was described as being "very upset", (R-480) and "paranoid", (R-481), but he nevertheless spoke with the officers.

The Defendant told the offficer that he really liked sex, and that he had a problem with violence, explaining that when he drank too much, he found himself doing things he had no control over. (R 507,1821). He indicated to the officers that he had a very large sex drive, and that he liked sex any way he could get it, anal, oral, or vaginal. (R-1821). He said that sometimes he would get excited and if he found out the girl was "cursed" he would get frustrated. (R-1822,1823). When the officers asked when this problem had shown itself, he said that it had occurred Wednesday night, (apparently referring to the date of the offense), (R-1823) and later said "Why do you think I have quit drinking since Wednesday night?" (R-1824). When the officers inquired further, he reportedly said "Well, nobody wants to go to jail and you do what you have to do to protect Bobby Waterhouse." (R-1825,1826).

Thereafter, the Defendant's trial counsel directly advised the officers that they were not permitted to conduct any further interviews with his client. (R-481,502).

B

THE TRIAL

In the early morning hours of January 3, 1980, Glen Shine, a clerk at the Veteran's Administration, was walking his dog along the waterfront in the Lassing Park area of St. Petersburg. (R-903-906). As the dog began to bark, Shine noticed that there was an apparently lifeless body floating face-down in the water. (R-906).

Mr. Shine summoned the assistance of an older gentleman hitting golfballs

in a nearby park, and the two agreed that they should immediately call the police. (R-906-907). Mr. Shine took his dog back to the apartment while the older man made the phone call, and then returned to the scene to wait for the police to arrive. (R-907).

Officer LeRoy M. Pierce, of the St. Petersburg Police Department, responded to the call at approximately 9:00 a.m., and proceeded to the Lassing Park area. (R-913). When he determined that the body had no life-signs, he moved everyone back from the scene and roped off the entire area. (R-915).

Sergeant Gail Murry and Identification Technician, Elmer Krysco, arrived at the scene shortly thereafter. (R-929,967). Technician Krysco, who took photographs and processed the crime scene for evidence, (R-931-937) discovered various items of clothing scattered over a wide area near the scene. (R-929, 949). Sergeant Murry confirmed that the testimony of the other two officers that there appeared to be drag marks in the sand near the high tide mark. (R-953).

Dr. Joan Wood, the Deputy Chief Medical Examiner for Pinellas County, testified that the victim died as a result of drowning some eight to twelve hours before the first exmination of the body at 11:45 a.m. on the morning of January 3, 1980. (R-1035). The victim had approximately thirty-six bruises and lacerations each of which occured prior to the time of death. (R-1036). No abnormalities were found in the examination of the vagina, but Dr. Wood found evidence strongly suggestive of the presence of semen in the rectum. (R-1037). The injuries found in the rectum suggested the insertion of some object other than a male penis. (R-1039). In response to a hypothetical question posed by the prosecutor, Dr. Wood testified that the rectal injury could have been caused by the insertion of a foreign object the size and consistency of a coke bottle. (R-1039,1040).

Blood tests conducted during the autopsy revealed that the victim had

type A blood. (R-1040). The vaginal swab demonstrated the presence of only blood type A, but the biomedical examination of the rectal area revealed substances indicating the presence of both blood types A and B. (R-1040). Dr. Wood explained that the presence of blood type B in the rectum could have been caused by the semen of a male subject commonly classified as a "secreter", or that the substances could have appeared for some other reason. (R-1042). Finally, Dr. Wood testitified that the injury to the rectum occurred prior to death, (R-1056) and that the victim could not have been conscious when she was dragged into the water. (R-1060).

Police officers first learned that the body examined by Dr. Wood was that of the victim Deborah Kammerer on January 7, 1980, after providing photographs to the news media, and reviewing missing persons reports. (R-975, 976). The known fingerprints of the victim were then compared to the latent fingerprints found in the apartment of Deborah Kammerer on Grove Street, in St. Petersburg, and were found to match. (R-1375).

Miss Kammerer was last seen by her friends Yohan Wenz and Carol Byers at the ABC Lounge on Fourth Street on the evening of January 2, 1980. (R-1078-1084) The three had gone to the lounge that night together, at Deborah's invitation, but Wenz and Byers left shortly before midnight. (R-1083,1094). Miss Kammerer told them that she wanted to stay a little longer, and that she would get a ride home with someone else. (R-1084).

Ms. Kyoe Ginn, the bartender at the ABC Lounge, testified that she knew both the victim and the Defendant as regular customers of the lounge. (R-1114,1116). She said that on the evening of January 2, she noticed that they were both in the bar alone after Wenz and Byers left, and that Miss Kammerer moved her chair over to where the Defendant was sitting. (R-1119). After about thirty minutes, she observed them leaving the lounge together. (R-1120). Ms. Ginn further testified that she saw the Defendant in

the lounge several days later drinking a straight orange juice and that she considered that unusual because she had never seen him order a non alcoholic drink. (R-1121).

Mr. Robert Lewis Van Vuren, the Defendant's supervisor at the R.J. Logget Plastering and Drywall Company, testified that the Defendant came to work on the morning of January 3, 1980, and asked if he could have the day off, explaining that he was "feeling rough". (R-1138-1140). At that time, Van Vuren noticed that the Defendant had red marks or scratches on each side of his face. (R-1140)

Mr. Van Vuren testified that he saw the Defendant again on January 7, 1980 and at that time, he appeared to have a little makeup on his face. (R-1143). He also noticed that the Defendant had new seatcovers in his car. (R-1143). Finally, Van Vanuren was allowed to testify that he had at certain times had conversations with the Defendant about sex and that the Defendant told him that he liked anal sex, and that he liked to beat or slap women when he did that. (R-1157,1158).

The Defendant's Aunt, Lois Foster, testified that the Defendant lived with her, but that she did not know his whereabouts between 11:00 p.m. on the evening of January 2, 1980 and 9:30 a.m. on the morning of January 3, 1980. (R-1248). She said that the Defendant stayed home from work on January 3, because he was not feeling well, but she did not notice any bruises on his face. (R-1249,1254). About 2:30 on the afternoon of January 3rd, she observed the Defendant washing his car, but she did not consider that unusual. (R-151,1251). Mr. Kenneth Norwood, a family friend who lived with the Fosters, tesified that the Defendant had washed his car on that afternoon. (R-1259).

The State called both the boyfriend of the victim, Gary S. Colvin, and the girlfriend of the Defendant, Sherry Rivers. (R-1265,1281). Colvin testified that he was familiar with the sexual preferences of Deborah Kammerer and

that she had a distinct dislike for anal intercourse. (R-1271). Rivers, who had been dating the Defendant for about three months prior to the incident, was allowed to testify that the Defendant had in the past stated a preference for anal intercourse, and that she had anal intercourse with him on more than one occasion. (R-1319).

Wilbur Ehlers, a crime scene technician for the St. Petersburg Police Department was called to the stand to identify various items of evidence taken from the Defendant's car. (R-1322). This testimony related principally to the taking of blood, hair and fiber samples, but Ehlers was permitted to testify that he also found ten baggies of marijuana in the glove compartment. (R-1365).

Various expert witnesses were called to give testimony relating to the analyses of the blood stains. David Baer, a crime laboratory analyst in serology testified that the type A blood found in the Defendant's car was similar to that of the blood of the victim. (R-1460-1502). Baer maintained that although the Defendant also had type A blood, the enzymes in the samples were similar to those of the type A blood of the victim. (R-1475). Theodore Yeshion, of the forensic serology section of the Tampa Regional Crime Lab, testified that through the use of a "luminol" test he was able to determine that blood once existed on the Defendant's jacket, and in various parts of his car, but was cleaned off or wiped off. (R-1544). Finally, Judith Bunker, the assistant to the Medical Examiner in Orlando, was qualified as an expert in blood stain patterns and gave her opinion from the configuration of the stains that the victim was struck with a hard object while seated in the right front passenger seat of the vehicle. (R-1579,1616,1620).

The State also called several microanalysts. Patricia Lasko of the Florida Department of Law Enforcement testified that a hair sample found in the Defendant's car was similar to that of the known head hair of the victim. (R-1685).

Lynn Henson, of the same Department, testified that fiber materials obtained in the vacuum sweepings of the Defendant's car were similar to the fiber materials found in the victim's coat and the victim's pants. (R-1720,1721).

Kenneth Young, an inmate who shared a cell with the Defendant while he was awaiting trial, was allowed to testify as to an incident relating to the Defendant and another inmate. According to Young, a very small, slender individual named Robert Clark came into the cell and the others were teasing him and telling him how cute he was. (R-1788,1789). The Defendant put a shank (jailhouse knife carved out of a spoon) up to Clark's neck and said "how about some of the poop-chute", and thereafter cleared everyone else out of the area. (R-1791,1792). Young said that he could hear Clark protesting, and that when the Defendant walked around to where the other inmates were, his fly was unzipped and his shirt was untucked. (R-1794). At this time, according to Young, the Defendant was alleged to have said "I wonder how he would like a coke bottle up his ass like I gave her." (R-1794).

Inmate Young also testified to a prior conversation he had with the Defendant concerning the testimony of Mr. Van Vuren. As Young related the conversation the Defendant said, "They say that my boss is going to say that I came to work all scratched up - I didn't even go into work - that lying son of a bitch - I got to scratched up." (R-1787).

Sergeant Murry was then recalled to the stand to relate the Defendant's pretrial statements to the Jury. She recounted the substance of each of the statements as previously described in the portion of this brief relating to the Motion to Suppress. (R-1836,1865). Detective Hitchcox gave similar testimony relating to the statements. (R-1865,1888).

The Defense called, among other witnesses, Leon Vasquez, the bouncer who was working at the ABC Lounge on the evening of January 2, 1980. (R-1928). He said that he had a conversation with Miss Kammerer on the night of

the offense, regarding a man who was bothering her in the bar. (R-1931). He also observed the Defendant Waterhouse in the bar that night having a conversation with one Steve Spitzig about the purchase of some marijuana. (R-1940). Mr. Vasquez testified that Waterhouse and Spitzig left the bar at about ten minutes to twelve, and that Sptiziq came back alone at approximately quarter to one. (R-1943). The victim was still in the bar when Spitzig returned. (R-1943). Finally, Vasquez told the jury that he explained these facts to Detective Hitchcox who said that he did not want to investigate the matter further because he did not want to help the defense. (R-1949).

In rebuttal, Robert W. Long of the St. Petersburg Police Department said that Mr. Vasquez told the police that the Defendant was speaking to the victim on the night in question. (R-2000). Other police witnesses testified that there would be no way for an identification checker standing in the hallway of the ABC Lounge to see the activity inside the bar, (R-2011), and that the officers had, after investigation, eliminated the unruly bar patron as a suspect. (R-2003).

C

THE PENALTY PHASE

The State introduced a certified copy of the Defendant's previous conviction for murder in New York (R-2254), and called Officer Lawrence L. Hawes, formerly of the Long Island Police Department, to explain the circumstances of that case. Mr. Hawes testified that the victim in that case, a seventy seven year old white female named Ella Mae Carter, was found dead lying naked in the bed of her residence. (R-2256, 2258). The crime scene investigation revealed blood leading from the hallway to the bedroom as well as on the bed itself, and it was apparent to the officer that the victim had tearing wounds near

the vaginal area and a bite mark on her breast. (R-2258).

The Defense recalled the Defendant's Aunt, Mrs. Lois Foster, who had taken care of the Defendant from the time he was six years old. (R-2269). She testified that the Defendant had been reaching out for help for the last fifteen years but the authorities in New York and Florida would not listen. (R-2227). It was Mrs. Foster's opinion that if the Defendant did commit the crime, it was because there was something mentally wrong with him. (R-2270).

ARGUMENT

A

THE MOTION TO SUPPRESS

POINT ONE

THE STATEMENTS OF THE DEFENDANT AND THE TANGIBLE EVIDENCE TAKEN FROM HIS CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THEY WERE OBTAINED AS A RESULT OF AN ILLEGAL ARREST OR DETENTION.

The first argument relating to the various search and seizure issues presented by this case is that the Defendant's January 7, 1980 trip to the St. Petersburg Police Department was an involuntary detention made without probable cause. It is respectfully submitted that the tangible evidence obtained from the vehicle and the two statements made on January 10 were the product of that unlawful detention and that they should therefore, have been excluded under the principles set forth in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

It is conceded that the Defendant was not actually arrested on January

7, 1980, but that has no effect upon the argument which follows. The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. Davis v. Mississippi, 394 U.S. 721, 22 L.Ed.2d 676, 89 S.Ct. 1394 (1969), Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), and United States v. Brignoni Ponce, 422 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975). The critical inquiry relates only to the question of whether the Defendant's appearance at the Police Station was voluntary, or whether the Police Officers otherwise had probable cause for the detention.

The Officers characterized the Defendant's appearance at the Police Station as "voluntary" but that characterization is not supported by the objective facts presented at the hearing on the Motions to Suppress. The United States Supreme Court recently held in Dunaway v. New York, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979), that a detention for custodial interrogation regardless of its label intrudes so severely on interests protected by the Fourth Amendment as necessarily trigger the traditional safeguards against illegal arrests. id at 442 U.S. 216.

In the Dunaway case, an informant told the police that a certain person may have been involved in killing the proprietor of a pizza store. Armed with this information, the officers brought the suspect into the station for questioning. Based upon this detention, without formal arrest or probable cause, a statement was given. The Defendant was given a full set of Miranda warnings, but the Court held that the warnings could not validate the statements produced as a result of the illegal detention. In reversing the conviction obtained by the use of the statement, the Court distinguished all of the exceptions to the probable cause requirement and ruled that a trip to the police station for questioning is an intrusion which requires probable cause.

The only arguable distinction between this case and Dunaway is that in

this case, the police officers said that the Defendant was free to go. That is an illusory distinction howver, given the fact that the evidence demonstrates that they lured him to the police station by retaining his driver's license, and the fact that they seized his car as soon as he arrived.

The issue of whether a particular detention is voluntary or involuntary is not to be made upon the characterization of the police, but rather upon the manner in which it reasonably appears to the person arrested. State v. Frost, 374 So.2d 593 (Fla. 3d DCA 1979). In the Frost case, two police officers working at the Miami International Airport detained the Defendant under circumstances which indicated to them that he was a possible drug courier. An alleged consensual search of his briefcase and suitcases revealing marijuana was held to be invalid because the officers had kept the Defendant's airplane ticket and driver's license during the period of the alleged voluntary questioning. In referring to the retention of the plane ticket and driver's license, the Court said "It is totally unrealistic, and therefore totally unacceptable... to suggest that [the Defendant's] consent was an entirely voluntary and cooperative one when influenced by a real and effective restraint placed upon him by the officers." id at 597.

In this case, as in Frost, the police officers effectively restrained the Defendant by depriving him of his means of transportation and by refusing to give him back his personal identification. The fact that they told him he was free to go at any time is but a meaningless gesture, obviously designed to lend credence to the theory that the station house questioning was "voluntary". Of course, the vehicle itself, from which the objectionable evidence was obtained, was seized as a direct result of the Defendant's "voluntary" appearance.

An involuntary detention might have been proper upon probable cause, see Dunaway v. New York, supra, but it is clear from the facts of this case,

that the police officers did not have probable cause at the time of the January 7, 1980 questioning session.

When the police officers received an anonymous call simply stating, "In reference to the bay murder, I have a license number for you GMU-603", (R-447) and learned that the vehicle referred to was registered in the name of the Defendant, a man with a prior record who had been seen on January 2, 1980 with the victim, they decided to call him in for questioning. The innocent circumstances do not lend sufficient support to the anonymous tip to make it rise to the level of probable cause.

While it is clear that an anonymous tipsmay be sufficient to justify the commencement of an investigation, Interest of G.A.R., 387 So.2d 404 (Fla. 4th DCA 1980), In re: Bertrand, 303 A.2d 486 (Pa. 1973) they are generally not sufficient to constitute probable cause for an arrest. State v. Hetland, 366 So.2d 831 (Fla. 2d DCA 1979).

In Commonwealth v. Brooks, 364 A.2d 652 (Pa. 1976), an anonymous caller simply told the police that "Brooks from Baltimore was one of the persons responsible for this shooting." The Court held that the tip was insufficient to constitute probable cause because there was no showing that the caller had personal knowledge of the contents of the call. Likewise, in this case, there is no indication whatever that the anonymous caller had any firsthand information regarding the contents of the call. Nor, was the inforamtion contained in the call specific enough to bear the indicia of reliability, State v. Hetland, supra.

These decisions demonstrate from a purely legal standpoint the fact that police officers did not have probable cause to arrest the Defendant on January 7, 1980. That conclusion however, is supported by the actions of the officers themselves, as they certainly would not have allowed him to go home on that day, with or without his car, if they thought they had probable cause to arrest him.

The examination of the Defendant's vehicle from the outside, and the subsequent search of the vehicle, were obviously the direct product of the illegal detention. The record clearly demonstrates that the observations from the exterior of the vehicle made by a police officer while the Defendant was being questioned by Sergeant Murry, were the cause of the subsequent detention and search of the interior of the vehicle.

The Defendant respectfully submits further, the two statements made on January 10, 1980 were the direct product of the illegal detention. In this case, as in Clewis v. Texas, 386 U.S. 707, 18 L.Ed.2d 423, 87 S.Ct. 1338 (1967), there was no "break in the stream of events" between the unlawful detention and the making of the statements. The Defendant in this case did not voluntarily return several days after the involuntary detention to make a statement, as the Defendant Wong Sun did in Wong Sun v. United States, supra. Rather, it appears that information obtained during the detention was used to support a finding of probable cause for the actual arrest.

For each of these reasons, the Defendant respectfully submits that all of the evidence obtained from him or from his vehicle subsequent to the Police questioning on January 7, 1980 should have been suppressed by the trial judge.

POINT TWO

THE TANGIBLE OBJECTS TAKEN FROM THE DEFENDANT'S CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THE POLICE OFFICERS LACKED PROBABLE CAUSE TO SEIZE THE VEHICLE PRIOR TO THE TIME THEY OBTAINED A WARRANT TO SEARCH ITS CONTENTS.

While the Defendant was talking to Sergeant Murry on January 7, 1980, Detective John W. Long was examining the 1973 Plymouth automobile by looking into the vehicle with a flashlight. (R-511). Based upon the observation of

some sand on the floor in front of the driver's seat and what appeared to be several dark stains on the floor directly behind the driver's seat (R 513), the officers decided to impound the vehicle and apply for a warrant to search its contents. (R 513,514). The Defendant respectfully submits that the seizure of the vehicle prior to the time the search warrant was obtained was improper.

The invasion of Defendant's privacy occasioned by the warrantless seizure of the vehicle was no less than that which would have occurred if the police had searched the entire vehicle without getting a warrant at all. That principle of law was clearly established in the landmark decision of the United States Supreme Court in Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970) wherein the Court stated:

> "...for constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." 399 U.S. at 52.

The Court went on to say that either course would be reasonable assuming the existence of probable cause to conduct the search.

The Chambers decision clearly establishes that the police officers in this case did not improve their position by obtaining a warrant to search the vehicle. The involuntary detention of the vehicle, admittedly against the Defendant's will (R-489) was in legal effect "a warrantless seizure" which must be tested by Fourth Amendment standards from the moment it occurred.

The examination of the exterior of the vehicle was not a violation of the Defendant's reasonable expectation of privacy, Cardwell v. Lewis, 417 U.S. 583, 41 L.Ed.2d 325, 94 S.Ct. 2464 (1974), and therefore did not in and of itself constitute a violation of the Defendant's constitutional rights. However, the examination did not reveal any evidence which could constitute probable cause to seize the vehicle without a warrant.

The decision of this Court in Riley v. State, 263 So.2d 200 (Fla. 1972) provides a good illustration of the quantum of evidence which would be necessary to support a finding of probable cause in a case such as this. In that case, two young boys accidentally came upon a man who was apparently shooting at something in the back seat of a blue Chrysler which proved to be registered in the name of the Defendant. Several days later, police officers in Michigan arrested the Defendant on an unrelated charge and discovered, upon a brief examination of the exterior of the blue Chrysler, that it had a bullet hole in the side, a rifle in plain view on the floor, blood-like dark red stains on the back seat, and flesh particles on the rear seat and rear window. These facts were held to constitute probable cause to impound the automobile.

Officer Long's observation of a little sand on the floorboard in front of the driver's seat could certinaly not be considered unusual in a coastal city such as St. Petersburg. The apparent immateriality of this observation was later verified by the State's geologist who could not testify that the particles of sand were similar to those found near the bayfront crime scene. (R-1665). Officer Long conceded that he observed an open coke bottle on the floor of the vehicle at the time he looked into it with a flashlight and that he could not determine the nature of the stain he observed from outside the vehicle. (R-521,523). The apparent insignificance of these observations was later demonstrated by the fact that one of the stains the officer observed was actually a Coca-cola stain. (R-521).

Perhaps the most telling fact in support of the argument that the police did not have probable cause to seize the vehicle on January 7, is that they declined to arrest the Defendant at that time and place. Obviously, they themselves did not believe they had probable cause to seize the automobile, for if they did, they would have also used it to arrest the Defendant. It is firmly established in the law that probable cause to conduct a search is the same as

that which would be required to make an arrest. See Draper v. United States, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959).

The cases upholding the impoundment of warrantless seizure of a vehicle upon probable cause universally involve factual situations wherein there was also probable cause to arrest the defendant. See e.g. Cooper v. California, 386 U.S. 58, 17 L.Ed.2d 730, 87 S.Ct. 788 (1967), Cady v. Dombrowski, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973), Chambers v. Maroney, supra, Cardwell v. Lewis, supra, and Texas v. White, 423 U.S. 67, 46 L.Ed.2d 209, 96 S.Ct. 304 (1975). In this case, the police officers allowed the Defendant to go home, apparently on the assumption that the facts went insufficient to constitute probable cause to search it.

For each of the foregoing reasons, the Defendant respectfully submits that the warrantless seizure of the vehicle preceding the warrant authorizing search of its contents was invalid. The tangible objects obtained from the car should not, therefore, have been admitted into evidence.

POINT THREE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO TERMINATE THEIR QUESTIONING AFTER THE DEFENDANT EXPRESSED HIS INTENTION TO REMAIN SILENT.

In the case before the Court, the police officers resumed questioning on several occasions after the Defendant indicated that he intended to remain silent. It is respectfully submitted that the statements produced by the renewed police interrogation, under these circumstances, should have been excluded from the evidence presented at trial.

The continuation of police questioning of an individual who has expressed

his intention to remain silent is clearly prohibited by Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). In that case, the Court instructed that:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing the statement after the privilege has been once invoked..." 384 U.S. at 473,474. (Emphasis supplied)

Some Courts and commentators have incorrectly assumed that the foregoing admonition contained in the Miranda decision was diminished by the subsequent decision of the Court in Michigan v. Mosley, 423 U.S. 96, 46 L.Ed. 2d 313, 96 S.Ct. 321 (1975). That decision however, permits a resumption of police interrogation only under the limited circumstances wherein a fresh set of Miranda warnings are given, and the questioning does not relate to the matter which was the subject of the Defendant's earlier refusal to speak. The Mosley decision would not authorize the resumed questioning in this case, for the police officers persisted in asking the Defendant questions about the same homicide, in the face of several clear indications that he did not wish to speak to them.

The limitations upon the decision of the Court in Michigan v. Mosley were illustrated in United States v. Clayton, 407 F.Supp. 204 (E.D. Wis. 1976) and United States v. Jakakas, 423 F.Supp. 564 (E.D.N.Y. 1976). The Court in Clayton pointed out that the holding in Michigan v. Mosley is limited to the facts of that case and noted:

> "It has been correctly pointed out that no indication is given [in Miranda] of what circumstances, if any, permit a resumption of questioning. Michigan v. Mosley, 423 U.S. at 98, 96 S.Ct. at 324, 46 L.Ed.2d at 319.

> However, the logical entailment of the Miranda Court's language mandates that "the interrogation must cease" at least with respect to the same crime and the same interrogating officer for a substantial period of time." (Emphasis supplied)

Likewise, the Court in United States v. Jakakas, supra, noted:

> "Furthermore, Michigan v. Mosley, supra, also seems to hold that a substantial period of time must be lapsed between an invocation of rights and a resumption of questioning and also possibly that the second interrogation be restricted to a crime that had not been a subject of the earlier interrogation." 423 F.Supp. at 569 (Emphasis supplied)

When the police officers in this case were transporting the Defendant to the jail on January 9, 1980, they had a brief discussion with him in the car, and he said "I think I want to talk to an attorney before I say anything else" (R-471). Nevertheless, the officers questioned the Defendant while he was being booked, and again in detail at 2:00 a.m. on the morning of January 10, 1980. (R-473). He did not have an opportunity to speak with an attorney at any time during the day of January 9 or in the early morning hours of January 10 prior to an interview.

During the first interview, which was conducted on January 10, 1980, the Defendant again advised the officers that he wished to speak to an attorney. On that occasion, he was reported to have said, "I'm kind of tired and I think I want to talk to my attorney, will you all come back tomorrow" (R-477). Admittedly, this statement could have been interpreted by the police officers as permission to come back the next day, but the point is that the interview wherein the statement was made should not have been conducted in the first place.

The Defendant's unequivocal statement to the police officers in the afternoon of January 9 that he wished to see an attorney before he made any further

statement should have caused the complete termination of all questioning. At the very least, it cannot be said upon this record, that the Defendant's "right to cut off questioning" was "scrupulously honored", Michigan v. Mosley, 423 U.S. at 104.

For these reasons, the Defendant contends that the statements he made to the police officers on January 10, 1980 should have been excluded from the evidence presented at his trial.

POINT FOUR

THE DEFENDANT'S FINAL STATEMENT SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO ADVISE THE DEFENDANT'S COURT APPOINTED ATTORNEY THAT THEY WERE CONDUCTING AN INTERVIEW.

The final and most incriminating statement taken from the Defendant on January 10, 1980 was obtained only after the police deliberately avoided making any contact with his court-appointed attorney. The trial judge originally ruled that this statement was inadmissible on the ground that the officers failed to notify the attorney known to have been appointed to represent the Defendant prior to the time they began the final questioning session. (R-388,579,580), but later reversed that ruling. (R-411,412,432). The Defendant respectfully submits that the trial judge's original ruling was correct and that the statement should have been excluded from evidence.

In Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), the Court held that police officers may not take a statement from a post-indictment criminal defendant known to be represented by counsel, without informing his attorney. The Court in Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758 (1964) extended the right to counsel to pre-indictment questioning where the questions go beyond a general inquiry

of the Defendant and begin to focus on him as a suspect. These principles combined, form the rule that the officers must notify an attorney representing a pre-indictment suspect who is the focus of an investigation, that they are about to question his client.[2]

For example, in Clifton v. United States, 341 F.2d 649 (5th Cir. 1965), the Court held that a pre-indictment statement made by the defendant to agents who failed to inform his court-appointed lawyer that they were conducting questioning was inadmissible. The Court noted that the agents knew, or should have known, that the defendant was represented by counsel, and that there was no excuse for their failure to call him. Likewise, the Florida Courts have held that once the police officers know of the representation of a criminal defendant by a particular attorney, they must notify that attorney before they may begin questioning. See Williams v. State, 188 So.2d 320 (Fla. 2d DCA 1966), and compare State v. Craig, 237 So.2d 737 (Fla. 1970).

This is not such a case as Sanders v. State, 378 So.2d 880 (1st DCA 1980) relied upon by the Court below, where the officers were merely negligent in ascertaining the status of the Defendant's legal representation.[3] Nor, is this such a case as Witt v. State, 342 So.2d 497 (Fla. 1977) where the defendant expressly indicated to the police that he intended to confess to the

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[2] At least one intermediate Appellate Court in this state has incorrectly assumed that the Massiah decision is categorically inapplicable to pre-indictment questioning. See Robinson v. State, 351 So.2d 1100 (Fla. 3d DCA 1977). That Court failed to consider the impact the Escobedo decision had upon the prior ruling of the Court in Massiah. Nor does the decision recognize that a deprivation of the Sixth Amendment right to counsel can, under certain factual situations, exist at any stage of the proceedings.

[3] The Defendant also contends that the First District Court of Appeals in Sanders improvidently relied upon the decision of this Court in Stone v. State, 378 So.2d 765 (Fla. 1980). In the Stone case, this Court merely held that a request for an attorney for an unrelated civil matter does not require the cessation of questioning under Miranda.

crime in spite of the fact that he was represented by counsel.

In this case, the police officer went to conduct an interview of the Defendant on the afternoon of January 10, 1980, with full knowledge that the Public Defender's Office had been appointed earlier that morning at an advisory hearing (R-478) and that a representative of the Public Defender's Office had conferred at length with the Defendant around noon on January 10, 1980 just prior to their interview. The officers conceded that they made no effort whatsoever to contact anyone in the Public Defender's Office to advise them that they were conducting an interview with their client. (R-499,500). Certainly under these facts, it cannot be disputed that the interrogation "focused on the Defendant" as a suspect in the offense. Escobedo v. Illinois, supra.

The trial judge was correct in ordering the suppression of the Defendant's final statement to the police, and the reversal of that decision on the State's Motion for Rehearing was error.

POINT FIVE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THEY WERE NOT SHOWN TO HAVE BEEN MADE VOLUNTARILY.

The question of whether a statement made by the accused was voluntary can only be answered by reviewing all of the circumstances surrounding the making of the statement. Blackburn v. Alabama, 361 U.S. 199, 4 L.Ed.2d 242, 80 S.Ct. 274 (1960), Boulden v. Holman, 394 U.S. 478, 22 L.Ed.2d 433, 89 S. Ct. 1138 (1969).

One circumstance which renders a statement involuntary is psychological coercion. Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963), Blackburn v. Alabama, supra. When the interrogators exert improper influence

such as a false show of sympathy, or an implied promise however slight, psychological coercion has been found. Malloy v. Hogan, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964). The Florida Courts have also recognized that emotional considerations as well as physical considerations have a bearing on voluntariness. For example in Breedlove v. State, 364 So.2d 495 (Fla. 4th DCA 1978) the Court ordered the suppression of the defendant's statement becauseshe was crying and obviously upset at the time it was made, and because that created a doubt as to the question of voluntariness.

Another factor to be considered in determining the voluntariness of a statement is the nature of the detention, 14 Fla. Jur. 2d CRIMINAL LAW §141 (1980). The length and condition of incarceration, and the degree to which the defendant is isolated from others all have a bearing on the issue.

The circumstances surrounding the statements made by Robert Waterhouse were detailed at the Motion to Suppress hearing. (R-468-477). It appears that Waterhouse was booked on the afternoon of January 9, 1980. Sometime around two or three o'clock in the morning, the officers visited Waterhouse and again attempted to ellicit statements from him. (R-473). They questioned him for several hours until finally Waterhouse asked them to leave because he was tired. (R-477).

Throughout that early morning interrogation Waterhouse demonstrated symptoms of emotional stress. Officer Murry testified that Waterhouse would often break down and cry. She said that they would terminate the interrogation while he cried, and resume it again when he stopped. (R-476). Officer Murry also testified that Waterhouse pleaded with them several times that he "just wanted to talk to them as people" and not as police officers. (R 476).

Later in the afternoon of January 10, 1980, after Waterhouse had spoken with his attorney, the same two officers again interrogated him. While Officer Murry was explaining his rights she told him that she really didn't know "if

what you and going to say can be used in court." (R 479). Officer Murry testified that during this interview, like the one in the early morning hours of that day, Waterhouse was upset and confused. (R-481). Also like the previous session, this interrogation lasted for several hours.

It is clear from the testimony of Officer Murry that Waterhouse was in a highly confused emotional state when he spoke with her. It is also clear that the officers intentionally exploited the prisoner's mental instability and took deliberate steps to compound it. First, they waited until the middle of the night to talk to him, knowing that he would be feeling particularly lonely and depressed at that time. Then, they pretended to be friendly and sympathetic and indicated that they only wanted to talk. For hours they interrogated him, stopping to let him cry, but starting back up whenever he quit crying. One who was not there can only imagine the mental anguish which Robert Waterhouse went through that night; being in prison, awake all night with no one to talk to but the police. Surely his emotional confusion was at least as bad as the defendant's in Breedlove, supra. where the Court said, "Appellant's emotional confusion raises serious doubts as to whether her statements were knowingly and intelligently made", Breedlove 364 So.2d at 497.

Officer Murry also testified that Waterhouse was upset and confused at the session which took place in the afternoon of that same day. (R-481). At that session, Officer Murry implied that statements made to her would not be used against him. This implied promise is the type of psychological trick which is barred by the Supreme Court's decision in Malloy, supra.

By looking at all the circumstances surrounding the statements made by the Defendant to the police officers, the voluntariness of those statements becomes dubious. The Defendant was left alone until two or three o'clock in the morning when he was approached by two apparently sympathetic and friendly officers. Throughout the night he was crying and showing other signs

of mental instability. The next day when his mental state had surely worsened from lack of sleep he was again approached by the officers. On this occasion, in addition to evincing false sympathy, they implied that the Defendant was free to talk to them without fear that his statements would be used against him in Court.

It is submitted that due to the psychological coercion, the implied promise, and the circumstances of the two a.m. interrogation, the statements made by Waterhouse to Officers Murry and Hitchcox were involuntary. Therefore the Motion to Suppress was improperly denied.

B

THE TRIAL

POINT SIX

THE EVIDENCE OF THE DEFENDANT'S ALLEGED POSSESSION OF MARIJUANA WAS IMPROPERLY ADMITTED BECAUSE IT DID NOT MEET THE RELEVANCY TEST REQUIRED BY THE FLORIDA EVIDENCE CODE AND THE WILLIAMS RULE.

Chapter 90.404(2)(a) of the Florida Evidence Code states that similar fact evidence of other crimes is admissible to prove a material fact in issue, such as proof of motive opportunity intent, plan, knowledge, identity or absence of mistake, but is inadmissible if relevant to prove bad character or propensity. This chapter is essentially a codification of the so called "Williams Rule".

The "Williams Rule" permits the introduction of evidence of "any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused..." (Emphasis supplied). Williams v. State, 110 So.2d 654 (Fla. 1959). In Williams, the Court attempted to lay to rest the question of when evidence of a collateral offense is admissible. Briefly,

the case holds that evidence of a similar act or offense may be used by the prosecution when it is relevant to demonstrate motive, intent, absence of mistake, common scheme, or identity. Id at 663. The matter of relevancy should be carefully and cautiously considered by the trial judge. Id at 663.

In the instant case, the trial judge permitted the prosecution to present evidence to the jury that marijuana had been found in Waterhouse's automobile almost a week after the crime had been committed. (R 1365). No argument was made that the evidence was relevant to prove a material fact in issue. The testimony regarding marijuana was offered and admitted solely for the purpose of corroboration. (R-1366).

A brief review of the record will demonstrate that the trial judge failed to cautiously scrutinize the relevancy of the evidence. Obviously, the fact that marijuana was found in the Defendant's car is not similar fact evidence. Equally obvious is the fact that this evidence has absolutely no bearing on the issue of whether or not the Defendant was connected with a murder that had taken place several days before. There was no allegation that the murderer was a marijuana user. Such an allegation would have been necessary to render the marijuana discovery relevant to show identity. Similarly, there is nothing in the case which would indicate that marijuana use would demonstrate motive, intent, absence of mistake or common scheme.

These are the types of issues the Court contemplated when it held that evidence of similar crimes may be used when relevant to a material fact in issue. Id at 663. The fact that the evidence in this case was admitted solely for the purpose of corroboration is proof that it was not used to demonstrate a material fact in issue. Therefore, the evidence does not fall within the "Williams Rule" exception to the evidence code. Id at 660, 663.

Allowing the jury to hear evidence that marijuana was found in the Defendant's car was highly prejudicial and inflamatory. The effect of the testimony was to attack the character of the Defendant even though his character had not been place in issue; as demonstrated in the preceding paragraph, the evidence had no bearing on any material fact in issue. It is clear that the trial judge did not "carefully and cautiously" consider the relevancy of the evidence as required by Williams. Id at 663. On the contrary, he perfunctorily ruled that because the testimony had some corroborative value it was admissible.

For these reasons, the trial judge should have granted Defendant's Motion for a Mistrial.

POINT SEVEN

THE EVIDENCE OF AN ALLEGED HOMOSEXUAL RAPE ATTEMPT WAS IMPROPERLY ADMITTED BECAUSE IT DID NOT MEET THE RELEVANCY TEST REQUIRED BY THE FLORIDA EVIDENCE CODE AND THE WILLIAMS RULE.

Over timely objection by the defense, the trial judge admitted evidence of another wrongful act allegedly committed by the defendant.[4] In overruling counsel's objection, the judge determined that the profferred testimony could be admitted without approaching it from a Williams Rule standpoint because the testimony provided background for the Defendant's statement against interest. (R-1753).[5]

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[4] The State offered testimony of one witness, a cell mate of the Defendant, that the Defendant had attempted anal rape on a third cell mate. The witness' testimony was uncorroberated and no charges were ever brought against the Defendant for the alleged offense.

[5] According to the witness, after the alleged offense took place, Waterhouse said, "I wonder how he'd like a coke bottle up his ass like I gave her." It is conceded that this statement is an admission admissible under §90.803(18) Fla. Stat. (1976) as an exception to the hearsay rule. It is the testimony regarding the events that led up to the statement that was improperly heard.

Providing background for a statement against interest (or an admission) is not one of the exceptions to §90.404(1) Fla. Stat. (1976), nor is it the type of issue contemplated by the Williams Rule. The fact that certain evidence might aid the party offering the admission to lay a foundation does not make such evidence relevant to prove a material fact. Therefore, the trial judge erred in admitting evidence of another wrong for the purpose of providing background for the Defendant's admission.

As stated in Point Four of the Brief, §90.404(2)(a) Fla. Stat. (1976) is basically a codification of the Williams Rule. The Rule and the Code require evidence of other crimes to be relevant to prove a material fact in issue, Williams v. State, 100 So.2d 654 (Fla. 1959). Relevancy is the decisive factor. Id at 663. Since the evidence of the alleged crime in the instant case was totally irrelevant to prove the offense charged, its admission was erroneous.

The evidence which was elicited at trial tended to show that the Defendant committed or attempted to commit a homosexual rape while he was in prison. The prosecution argued that this act was relevant to prove that the Defendant had the motive or intent to commit the heterosexual attack with which he was charged.

In support of his contention, the prosecutor cited Alford v. State, 307 So. 2d 433 (Fla. 1975). In that case, the Court held that a frustrated attempt to have a homosexual liason just prior to the heterosexual rape was relevant to show that the defendant had a motive (i.e. an unfulfilled sexual urge) to commit the subsequent attack. Id at 438.

When viewed in this light, Alford has no bearing on the case at bar. In Alford, the other crime occurred just prior to the crime charged and in effect created the motive or state of mind which caused the defendant to commit the

subsequent crime. Therefore, it was logical for the Court to find that the previous crime was relevant to show motive even though the previous crime involved homosexuality and the crime charged did not.

In the instant case, however, the alleged other crime took place seven months after the crime with which the Defendant was charged. The Defendant was in prison at the time of the collateral offense but had been free at the time of the charged offense. The sole similarity of the two offenses was the presence of some kind of anal penetration. In Braen v. State, 302 So.2d 485 (Fla. 2d DCA 1974), the Court held that where the sole similarity in two instances was the copulation per anus the requisite similarity was not present. In that case, as in this one, the State sought to introduce evidence of a homosexual rape in a prosecution involving a heterosexual rape.

The evidence might show that the Defendant enjoyed anal sex with young men when he was in prison. However, that is not relevant to show that he had a motive to commit the crime with which he was charged. Gary Colvin, the victim's boyfriend, testified that he had attempted anal sex with the victim. That testimony might show that he enjoyed anal sex with women, but it certainly does not show that he had a motive to assault and murder someone. At least the testimony of Colvin showed that he liked to have anal sex with women. The evidence of the attempted jail house rape is not even relevant to show that about the Defendant Waterhouse.

The Williams Rule is not an open invitation to prosecutors to introduce any collateral offense which contains an element also found in the offense charged. The other offense must be factually similar, §90.404(2)(a) Fla. Stat. (1976), and must be relevant to prove a material issue in the case being tried. The implication that the Defendant desired anal sex with another man does not tend to prove that he had motive, opportunity, intent, or the state of

mind to commit the offense with which he was charged. Therefore, the evidence of the other offense was irrelevant and was improperly admitted.

C

THE PENALTY PHASE

POINT EIGHT

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CAPITAL FELONY WAS COMMITTED BY THE DEFENDANT FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

The trial judge found that the "murder in the present case was committed for the purpose of avoiding or preventing a lawful arrest in that the victim in the instant case was killed in order to eliminate her as a witness to the involuntary sexual battery, (R-408 ¶D). The finding is not supported by the evidence, and is therefore erroneous.

The record does contain testimony to the effect that the Defendant attempted to conceal some evidence relating to the murder after it was committed[6], but that would not support the trial judge's conclusion for it is clear that §921.141(5)(e) Fla. Stat. (1977) requires the capital felony itself to be done for the purpose of avoiding arrest. There is no evidence in this record, direct or circumstantial, which would indicate that the murder was committed by the Defendant to avoid arrest. The conclusion that

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[6] For example, the luminol tests were introduced for the purpose of demonstrating that the Defendnat cleaned blood off of some items of evidence, (R-1524-1544) and several witnesses said that the Defendant cleaned out the inside of his car. (R-1215,1239).

this aggravating circumstance exists cannot be reached in view of the test set forth in the decisions of this Court.

In Riley v. State, 366 So.2d 19 (Fla. 1979), the Court held that the aggravating factor, referring to the elimination of witnesses to avoid arrest, is not limited to the killing of police officers, but noted:

> "... We caution, however, that the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement officer. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases..." (Emphasis supplied).

Likewise, in Menendez v. State, 368 So.2d 1278 (Fla. 1979), the Court held that the motive of avoiding arrest cannot be assumed from the facts but must be proven by the State.

The written Order in support of the death penalty concludes that the murder was committed to eliminate a witness, but there are no findings of fact in the Order to support the conclusion. Furthermore, the record itself fails to contain any such evidence. Clearly the State did not meet its burden of proving that the murder in this case was committed to eliminate a witness.

POINT NINE

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CAPITAL FELONY WAS PARTICULARLY HEINOUS, ATROCIOUS AND CRUEL

Subsection (h) of §921.141(5) Fla. Stat. (1977) relating to murders which are particularly heinous, atrocious, and cruel cannot be applied to this case for the State failed to prove beyond a reasonable doubt that the victim was conscious at the time the injuries described as "cruel" were inflicted.

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the Court held that the act of dismembering the victim with a saw and a fishing knife was not

particularly heinous, atrocious and cruel because the defendant had apparently already killed the victim at that point. If this section of the law is to apply to the acts which are "unnecessarily torturous to the victim", see Dixon v. State, 283 So.2d 1 (1973), then it would seem that the principle of Halliwell would apply to one who is unconscious as well as to one who is already dead.

Althought the Medical Examiner testified that the injuries to the victim occurred prior to death, (R-1036,1056) she said that the victim could not have been conscious at the time her body was dragged into the water. (R-1060). It is obvious that the victim must have been both conscious and aware of what was going on during at least some of the beating, but that fact alone would not constitute evidence sufficient to support an application of this aggravating circumstance, see e.g. Swan v. State, 322 So.2d 485 (Fla. 1975).

For these reasons, the Defendant respectfully submits that the trial judge improperly applied this aggravating circumstance.

POINT TEN

THE TRIAL JUDGE ERRED IN BASING TWO AGGRAVATING CIRCUMSTANCES ON ONE PRIOR ACT OF THE DEFENDANT.

Two of the aggravating circumstances listed by the trial judge refer to the same prior conviction. The judge found that the Defendant was serving a term of imprisonment at the time of the present homicide and that he was previously convicted of a felony involving the use of threat of violence to the victim. These two circumstances are based on the same previous felony committed by the Defendant. Considering the same aspects of the Defendant's past to constitute two separate aggravating circumstances amounts to a doubling

up of aggravating factors. This Court has held that such doubling up of circumstances is improper. Provence v. State, 337 So.2d 783 (Fla. 1976).

It will not always be the case that a finding that §921.141(5)(a) Fla. Stat. (1977) and §921.141(5)(b) Fla. Stat. (1979) will amount to a cumulation of circumstances. For example, a person might be currently under a sentence of imprisonment for embezzelment and have previously been convicted of assault and battery. However, as applied to the Defendant Robert Waterhouse, one act constitutes two circumstances. Therefore, aggravating circumstances (A) and (B) of the trial judge's Order are cumulative in violation of Provence and both should not have been considered.

POINT ELEVEN

THE INVOLUNTARY SEXUAL BATTERY WAS AN ESSENTIAL ELEMENT OF THE HOMICIDE AND AS SUCH, IT COULD NOT CONSTITUTIONALLY BE USED AS AN AGGRAVATING CIRCUMSTANCE.

The trial judge found as an aggravating circumstance that the murder was committed while the Defendant was engaged in the commission of an involuntary sexual battery. (R-408 ¶C) The Defendant contends that this was error as the involuntary sexual batterycannot be both an element of the offense under the felony murder rule, and at the same time be an aggravating circumstance sufficient to justify the imposition of the death penalty for the murder.

To hold that a felony offense can double as an element of proof of the murder under §782.04(1)(a) Fla. Stat. (1979) and as an aggravating factor of the murder under §921.141(5)(d) Fla. Stat. (1979) would violate several fundamental principles relating to the constitutional applicability of the death penalty. First, it is clear that the type of "aggravation" necessary to justify the imposition of the death penalty is something more than that which is

necessary to prove the crime itself. The very reason the Florida capital sentencing statute was upheld is that it requires proof of some aggravation which sets the case apart from the norm of capital felonies, see Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976), and State v. Dixon, 283 So.2d 1 (Fla. 1973). Secondly, the use of the enumerated felony in the penalty phase would provide a built in aggravating factor in every felony murder case and consequently a presumption[7] that death is the appropriate penalty.

This Court held in State v. Pinder, 375 So.2d 836 (Fla. 1979), that a criminal defendant may not be convicted of both felony murder and the felony which served as the basis of the felony murder conviction. It follows then, that a given felony cannot constitute "aggravation" sufficient to justify the imposition of death if it also serves as the basis of the first degree felony murder conviction for which the death penalty is sought.

In Provence v. State, 337 So.2d 783 (Fla. 1976), the Court held that a murder committed while the defendant was engaged in the commission of a robbery could not also be aggravated on the basis that it was committed for pecuniary gain. Such a result would allow the same aspect of the defendant's crime to constitute two separate aggravating circumstances since the robbery is by its nature, committed for pecuniary gain. Since that decision, the Court has been careful to prevent the cumulation of aggravating circumstances based upon the same fact, see Meeks v. State, 339 So.2d 186 (Fla. 1976), Gibson v. State, 351 So.2d 948 (Fla. 1977), Jackson v. State, 359 So.2d 1190 (Fla. 1978), Riley v. State, 366 So.2d 19 (Fla. 1979), and Mikenas v. State, 367

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[7] The existence of at least one aggravating circumstance creates a presumption that the death penalty is the appropriate penalty. State v. Dixon, 283 So.2d 1 (Fla. 1973)

So.2d 606 (Fla. 1979). If aggravating factors cannot duplicate each other, it seems highly unlikely that they should be permitted to duplicate essential elements of the crime itself.

There can be no doubt about the fact that the involuntary sexual battery in this case was used both as an element of the murder conviction and as an aggravating circumstance supporting the death sentence imposed for that conviction. The trial judge in instructing the jury said:

> "...Murder in the first degree is [an] .. unlawful killing of a human being when ... committed by a person engaged in the perpetration of ... involuntary sexual battery... (R-2198,2199)
>
> "...The killing of a human being when committed by a person in the perpetration of or in the attempt to perpetrate...involuntary sexual batter...is murder in the first degree even though there is no premeditated design or intent to kill... (R-2200)

Following that instruction, the trial judge instructed the jury in detail as to the elements of involuntary sexual battery, as that offense may have applied under the felony murder rule. (R-2201,2202).

After the Defendant was convicted of first degree murder, the trial judge set forth the reasons for imposing the death penalty as follows:

> "...The murder in the present case was committed by Robert Brian Waterhouse while Robert Brian Waterhouse was engaged in the commission of a Rape, also known as an Involuntary Sexual Battery, a life felony, upon the victim... (R-408 ¶C)

Of course, if the jury found the defendant guilty on the basis of the premeditated murder, then the trial judge would be free to use the involuntary sexual batter as an aggravating factor. One would have to indulge in pure speculation to reach that conclusion however, as there is no indication in the record as to which of the two theories advanced by the state, the jury accepted.

The Defendant submits that the burden should be on the state to demonstrate that the aggravating circumstances are independent from the elements of the crime. If the prosecution proved beyond a reasonable doubt that the murder was committed while engaged in a rape, the jury may very well have used that factor to convict the Defendant under the Court's felony murder rule instruction. If that was the case, it was improper to use that factor as an aggravating circumstance as well.

In summary of this point, the sentence is illegal and in violation of the constitution because the aggravating factor upon which it depends was improperly applied.

CONCLUSION

The judgment of the trial court below should be reversed.

Respectfully submitted,

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Florida 32302
(904) 224-3636

ATTORNEY FOR APPELLANT, ROBERT BRIAN WATERHOUSE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Hon. Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32301 by U. S. Mail this 6 day of May, 1981.

PHILIP J. PADOVANO

IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Appellant,

vs. CASE NO. 59,765

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Florida 32302
(904) 224-3636

ATTORNEY FOR APPELLANT

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A

THE MOTIONS TO SUPPRESS

POINT ONE

THE STATEMENTS OF THE DEFENDANT AND THE TANGIBLE EVIDENCE TAKEN FROM HIS CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THEY WERE OBTAINED AS A RESULT OF AN ILLEGAL ARREST OR DETENTION.

The State, apparently conceding that the officers lacked probable cause for an arrest or investigatory detention, have relied entirely upon the argument that the defendant "voluntarily" appeared at the police station on January 7, 1980. This argument, however, is not supported by the record.

Counsel for the State has attempted to characterize the issue as one involving a "credibility question" the resolution of which was exclusively within the province of the trial court. While there are conflicts in the testimony to be sure, those differences do not affect the argument. We submit that even if the officers' testimony is taken as true, the Defendant's appearance at the police station for questioning was not shown to have been voluntary.

The police officers characterized the events in a different way, but their recollection of the facts is not substantially different from that of the Defendant's. Moreover, the critical testimony given by the Defendant, i.e. that he went to the police station only to obtain the return of his driver's license, was not rebutted in any way by the officers.

The Defendant testified that the only reason he followed the officers to

station was that they did not give him his driver's license back. (R-540). He said that he had asked Officer Stelljes to give him his license back at the scene of the stop and that the officer said "Well, you will have to go to the police station to get it back." (R-540). Detective Leake testified that he did not observe Detective Stelljes giving the license back (R-533), and Detective Stelljes who was himself called as a witness for the State was not even asked whether or not he gave it back. Thus, it could hardly be said that the Defendant's testimony on the critical question (why he went to the police station) was in "conflict" with the testimony of the officers.

Nor is the Defendant's testimony that the officers would not give him his car back once he arrived at the police station in conflict with the testimony of the officers. They admitted that they would not give the car back. (R-462).

In spite of the unrebutted testimony that the Defendant went to the police station only to get his driver's license back, and the police officers' admission of the fact that they refused to return the Defendant's vehicle, they insist upon characterizing the Defendant's appearance as voluntary. Such characterizations are of little use, however, as the Court must resolve such issues by analysis of the objective facts. It makes no difference whether the police decline to term the event as a formal arrest, Dunaway v. New York, 422 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), or whether they themselves consider the detention to be voluntary, State v. Frost, 374 So.2d 593 (Fla. 3rd DCA 1979). The important consideration involves the manner in which the detention reasonably appears to the Defendant.

In this case, the police officers not only took the Defendant's personal identification and his license to drive a car, but at some point, took the car itself. Here, no less than in Frost, supra, "it is totally unrealistic, and there-

fore, totally unacceptable...to suggest that [the defendant's] consent was an entirely voluntary and cooperative one when influenced by a real and effective restraint placed upon him by the officers." Id at 597.

For these reasons, the Defendant respectfully submits that the evidence obtained from him or from his vehicle subsequent to the station house questioning on January 7, 1980, should have been suppressed by the trial judge.

POINT TWO

THE TANGIBLE OBJECTS TAKEN FROM THE DEFENDANT'S CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THE POLICE OFFICERS LACKED PROBABLE CAUSE TO SEIZE THE VEHICLE PRIOR TO THE TIME THEY OBTAINED A WARRANT TO SEARCH ITS CONTENTS.

In response to the arguments of the State on this point, the Defendant relies upon the arguments originally made in the Main Brief. (Appellant's Brief, p. 20-23).

POINT THREE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO TERMINATE THEIR QUESTIONING AFTER THE DEFENDANT EXPRESSED HIS INTENTION TO REMAIN SILENT.

It is respectfully submitted that the decision of the Supeme Court in Edwards v. Arizona, ___ U.S. ___, 49 U.S.L.W. 4496 (May 18, 1981)[1] is controlling, and that it requires the suppression of all statements made by the Defendant to the police after he informed them of his desire to speak with an attorney.

The Court in Edwards squarely held that in the absence of an express waiver, the police may not re-interrogate a suspect who has once invoked his right to counsel. Mr Justice White speaking for a majority of the Court said:

> "...and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. We further hold that an accused...having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication..." 49 U.S.L.W. at 4498.

In this case, the police officers clearly initiated the re-interrogation which produced the statements sought to be suppressed, after the Defendant told them he wanted to speak with an attorney. The officers conceded that while the Defendant Waterhouse was being transported to the police station

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[1] The State correctly pointed out that the Edwards decision was not cited in the Appellant's Main Brief. (Appellee's Brief, p. 9). That is because the decision was published 12 days after the Appellant's Brief was served.

following his arrest on January 9, 1980, he said to them, "I think I want to talk to an attorney before I say anything else." (R-471). Thus Edwards prohibits the use of statements made subsequent to that point, in the absence of an express waiver of counsel, or some showing that the Defendant himself initiated the interviews. Neither exception can be established by this record.

The decision of the Court in the Edwards case should come as no surprise to those legal commentators who have correctly read the Court's decision in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed 2d 313 (1975). As we pointed out in the Main Brief, the Mosley case only permits a resumption of questioning provided the accused is given a fresh set of Miranda warnings, and provided that the questioning relates to some matter other than the investigation in which the accused originally invoked his right to counsel. It has been the law since Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) that the police may not resume questioning in the same interrogation after the accused indicates his desire to speak with an attorney. The Court in Miranda said:

> "...Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner at any time, prior to or during questioning, that he wishes to remain silent, the interrogation must cease..." 384 U.S. at 473, 474 (Emphasis supplied).

The Miranda and Mosely decisions foreclose any question about whether the more recent decision in Edwards can be applied to this case. The latter case does not announce any new principle of constitutional law; it merely clarifies existing law. Police officers have never had the right to resume questioning after a suspect invokes his right to counsel. Miranda, supra.

Predictably, the State has offered the argument that this case is factually distinguishable from Edwards. Carried to its logical extreme, all cases are factually distinguishable. There are many cases which are factually

distinguishable from Miranda, but that does not mean that the Miranda warnings are not required. The State contends that the Defendant's invocation of his right to counsel was equivocal. What he actually said, however, was "I think I want to talk to an attorney before I say anything else." (R-471)[2]. If would be difficult indeed to imagine a more unequivocal expression of the Defendant's intention to speak with a laywer before he gives any more information to the police.

Finally, the State contends that even if the statements were improperly allowed under Edwards, they were merely cumulative of other evidence[3], and the error was therefore harmless. The statements were not cumulative, however, for all of the other evidence in the case was purely circumstantial. If the prosecutor had any direct evidence (other than the statements of the accused), he probably would not have had to resort to such exotic scientific evidence as "luminol" tests and "blood spatter stain" tests.

Counsel for the State has argued that the statements given on January 9th were merely cumulative of the "other valid" statements given by the Defendant on January 10th. (Appellee's Brief, p. 13). Somehow counsel assumed that the January 10th statement is not also inadmissible for the reasons expressed here. The State did not explain why that statement would not be affected by the argument made under this point, but so there will be no confusion, we contend that all statements made subsequent to the time the Defendant invoked his right to counsel are inadmissible under Edwards. The

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2 The State's Brief refers, out of context, to only a portion of this statement. (Appellee's Brief, p. 11).

3 Some of the evidence the State contends was cumulative, for example, the evidence relating to the anonymous tip, and the evidence relating to the license check, (Appellee's Brief, p. 13) was presented at the Motion to Suppress hearing; not the trial.

Defendant has another argument for exclusion of the January 10th statement (See Point Four) but that is not the only argument as to that statement; it is in addition to the argument made here.

On January 10th, the Defendant told the officers that he had a large sex drive and that when he had too much to drink, he had a tendency to become violent. (R-507,1821). He indicated that he liked sex any way he could get it, anal, oral, and vaginal, (R-1821) and that he frequently became frustrated to find out that his female companion was having her period. (R-1822, 1823). When the officers asked when these problems had last occurred he replied that it was the preceding Wednesday night (apparently referring to the night of the offense), (R-1823) and later said "Why do you think I have quit drinking since Wednesday night?" (R-1824). When the officers inquired further, he reportedly said "Well, nobody wants to go to jail and you do what you have to do to protect Bobby Waterhouse." (R-1825,1826). These statements provided incriminating evidence which was not duplicated by other evidence obtained by the police. Certainly it cannot be said that the error in admitting the statements was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 17 L.Ed 2d 705, 87 S.Ct. 824 (1967).

For these reasons, the Defendant respectfully submits that the introduction of the statements was error, and that the case should be reversed for a new trial.

POINT FOUR

THE DEFENDANT'S FINAL STATEMENT SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO ADVISE THE DEFENDANT'S COURT APPOINTED ATTORNEY THAT THEY WERE CONDUCTING AN INTERVIEW.

The State's argument on this point succeeds only in establishing that the rule in Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed 2d 246 (1964) does not per se require exclusion of pre-indictment statements taken from a defendant known to be represented by counsel. We do not contend that such statements are excludable in all cases; only that the facts and circumstances of this case require exclusion.

In this case, there was absolutely no excuse for the police officers to question the Defendant without advising his attorney that they were about to do so. They knew the Defendant did not waive his right to counsel, for he told them point blank on January 9th and again on January 10th that he wished to speak with an attorney. (R-471,477). They must have known that he did not wish to confess, for he repeatedly told them that as well. See e.g. (R-479). Finally, they knew that the Public Defender was appointed to represent the Defendant and that a representative of that office had conferred at length with him around noon on January 10th. (R-478,499,500). Nevertheless, they went to speak with the Defendant without making any effort whatsoever to tell the Public Defender, much less ask him if it was alright. (R-499,500). When they arrived at the Defendant's cell that afternoon, they found him to be "paranoid" and "very upset" (R-480,481), but being undeterred by any of that, they proceeded in the absence of his lawyer to elicit the most incriminating statement used in this case.

The trial judge originally ordered the exclusion of this final statement, (R-388,597,580) and his first reaction was correct. Surely the right of an accused to be represented by counsel would mean nothing at all if the police are permitted to knowingly and intentionally deal with the accused behind his lawyer's back.

There may be some situations, as the State points out, where absolute adherence to Massiah is not required prior to filing the indictment. This is not one of them. We are not dealing with a case where the officers were merely negligent in ascertaining the status of the defendant's legal representation, Sanders v. State, 378 So.2d 880 (Fla. 1st DCA 1980) or a case where the defendant expressly indicated to the police that he intended to confess to the crime in spite of the fact that he was represented by counsel, Witt v. State, 342 So.2d 497 (Fla. 1977).

For these reasons, and those expressed in the Main Brief, it is respectfully submitted that the trial judge was correct in ordering the suppression of the Defendant's final statement to the police, and that the reversal of the decision on the State's Motion for Rehearing was error.

POINT FIVE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THEY WERE NOT SHOWN TO HAVE BEEN MADE VOLUNTARILY.

The State has made no substantive argument in response to the Defendant's contention that his statements were involuntary. Rather, counsel for the State relies entirely upon the procedural ground that voluntariness is not in issue because it was not properly preserved for appellate review. The State's argu

ment, which purports to be based upon Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 594 (1977) is without merit, first because that decision does not establish any point relating to the preservation of state appellate issues, and secondly because the Defendant did object to the confession in the trial court.

The Supreme Court in Sykes was presented only with the question of whether the defendant was entitled to challenge his confession in a federal habeas corpus proceeding under 28 U.S.C. §2254. The Court was not making a rule, (nor could it have made a rule) respecting the manner in which alleged state trial errors are preserved for review in state appellate courts. In the Sykes case, the defendant objected to the introduction of his statement on the ground that the state had not yet shown the corpus delicti, but he made no objection at all to the statement itself. It was the lack of any objection and not the failure to object on a particular ground, that led the court to believe the defendant had not fairly presented his claim to the state court, and therefore was not entitled to federal habeas corpus review.

In this case, the Defendant challenged the statements in three separate written motions. A hearing was held in the lower court, in which a great deal of time was spent examining and cross examining witnesses about the Defendant's emotional state at the time the statements were made. The fact that the written motions do not specifically refer to voluntariness does not preclude consideration of the issue because all of the matters specifically raised, necessarily relate to the ultimate question of whether the statements were or were not voluntary. The trial judge evidently thought that the issue of voluntariness was fairly encompassed within the defense objection because he made an express finding of voluntariness. (R-580).

Counsel for the State has confused objections with arguments on objections. The failure to preserve an alleged error for review by failing to object to the judicial act alleged to be erroneous, is not at all the same as the failure to give a particular legal argument in support of the objection. The question of whether a given error has been preserved for review relates only to the question of whether the objection should have been sustained, not upon the particular legal analysis made of it during the trial. See generally 3 Fla. Jur 2d APPELLATE PRACTICE §92, 95 (1978).

The Appellee overlooks the fact that the ultimate responsibility of the Appellate Court is to determine (for whatever reason) whether the order under review is legally correct, Congregation Temple v. Aronson, 128 So.2d 585, (Fla 1961). The process of reasoning by which the trial court reached its conclusion is not regarded as the controlling factor in entering a reversal or affirmance. Hamelmann v. State, 113 So.2d 394 (Fla. 1st DCA 1969).

This Court in adopting the new appellate rules allowed for an even greater degree of flexibility in the appellate courts than that which was allowed by the common law, and previous editions of the rules. The Court not only dispensed with the requirement that the Appellant file assignments of error, but provided that such assignments of error are improper, Fla. R. App. P. 9.040(e). Moreover, the Appellate Courts were given the jurisdiction which may be necessary to a "complete determination" of the cause, Fla. R. App. P. 9.040(a), the power to disregard procedural errors which do not affect the substantial rights of the parties, Fla. R. App. P. 9.040(d), and the ability to provide a remedy not requested by the parties, Fla. R. App. P. 9.040(c).

In this case, an objection to the statements was made in the trial court. The trial court considered the objection at a lengthy pre-trial hearing and found, among other things, that the statements were voluntary. If there was

some procedural defect in the written motions filed by the Defendant's attorneys it is difficult to see how it affected the "substantial rights" of any of the parties.

Counsel for the State is plainly wrong in the assertion that the Defendant's trial counsel did not object to the trial court's ruling on voluntariness. The colloquy cited in the State's Brief is taken from the trial, and demonstrates no more than the fact that the defense attorneys recognized that they were bound by the trial court's ruling on voluntariness made earlier at the motion to suppress hearing. (Appellee's Brief, p. 21,22) (R-1813,1814). The remarks of the defense attorneys referred to in the State's Brief show that they respected the judge's ruling and that they considered it to be "res judicata"; they do not show that defense counsel agreed to the ruling or that they never objected to it in the first place.

As to the substantive argument on voluntariness, the Defendant relies upon the argument originally made in the Main Brief. For the reasons expressed there, and in this Reply Brief, the Defendant respectfully contends that the statements should have been excluded from evidence at trial on the ground that they were involuntary.

B

THE TRIAL

POINT SIX

THE EVIDENCE OF THE DEFENDANT'S ALLEGED POSSESSION OF MARIJUANA WAS IMPROPERLY ADMITTED BECAUSE IT DID NOT MEET THE RELEVANCY TEST REQUIRED BY THE FLORIDA EVIDENCE CODE AND THE WILLIAMS RULE.

The State's reliance upon Malloy v. State, 382 So.2d 1190 (Fla. 1979) is misplaced, first because that decision involved an incident which was part of a chain of chronological events leading to the offense charged, and secondly because the proof of the incident in that case did not establish all of the elements of a criminal offense.

In Malloy, where the Defendant was charged with first degree murder, the Court allowed testimony relating to his use of a rifle in the parking lot of a lounge earlier in the evening. Part of the reason for approving the use of the testimony was that the evidence relating to the use of the rifle did not in and of itself establish that the Defendant had committed a "separate crime", not referred to in the charge. The Court said: "...the circumstances of the lounge incident do not establish all the elements of a crime and, consequently the question of the admissibility of prior criminal acts is not present..." id 1192. In this case, technician Wilbur Ehlers was permitted to testify that he found ten baggies of marijuana in the glove compartment of the Defendant's car. (R-1365). Thus it appears in this case that all the elements of a separate crime, i.e. possession of marijuana, were established.

The second major distinction is that the Malloy case involved an incident which was part of the chain of events leading up to the murder, and this one did not. In the case below, the marijuana was found in the Defendant's car

almost one week after the murder had been committed. (R-1365). The evidence relating to the Defendant's possession of marijuana has no arguable bearing on the question of whether he committed the murder. It is not relevant to the offense, nor is it part of the sequence of events necessary to a logical presentation of the case.

Upon these arguments and those more fully developed in the Main Brief, the Defendant respectfully submits that it was error to allow testimony concerning the marijuana and that the trial judge should have granted the Defendant's Motion of Mistrial.

POINT SEVEN

THE EVIDENCE OF AN ALLEGED HOMOSEXUAL RAPE ATTEMPT WAS IMPROPERLY ADMITTED BECAUSE IT DID NOT MEET THE RELEVANCY TEST REQUIRED BY THE FLORIDA EVIDENCE CODE AND THE WILLIAMS RULE.

The State did not present any authority for the proposition that evidence of a prior criminal act is relevant and therefore admissible simply because it explains a pre-trial statement which is itself admissible as a statement against interest.

The introduction of the evidence of a homosexual rape attempt upon an inmate in the Pinellas County Jail for the sole purpose of explaining a statement the prosecutor wanted to offer as an admission against interest clearly does not fall within the "Williams Rule". We concede that evidence of prior criminal conduct is admissible as being relevant to the offense charged, if it tends to show motive sommon scheme or plan, identity, or intent. We also concede that

evidence of the fact that the Defendant made a pre-trial statement against interest to a third party is admissible. There is no precedent, however, (and the Court should not make one) for the proposition that evidence of prior criminal conduct is admissible for the purpose of explaining pre-trial statements.[4]

If the statement is admissible on the ground that it is truly an admission against interest, it will be sufficiently inculpatory in and of itself to be of probative value, without the use of secondary evidence to explain what the declarant meant. Even if the trial judge was correct in allowing the statement as an admission against interest (R-871) that does not establish the propriety of allowing the witness to testify as to the details of the alleged homosexual rape. That testimony if admissible at all, depends upon whether it is relevant to the offense under the Williams Rule.

For these reasons, and those more fully expressed in the Main Brief, the Defendant contends that it was error for the trial judge to allow testimony relating to the alleged jailhouse rape.

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[4] In Ruffin v. State, ___ So.2d ___, 1981 F.L.W. 228 (Case No. 55,684, March 26, 1981), cited by the State, the challenged evidence was admitted because it proved identity, explained where the murder weapon was and how the Defendant was apprehended. The Court did not rule that other criminal acts were admissible to explain the Defendant's statements.

C

THE PENALTY PHASE

POINT EIGHT

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CAPITAL FELONY WAS COMMITTED BY THE DEFENDANT FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

The State contends that the record is sufficient to support a finding that the murder was committed to avoid arrest or detection and therefore the trial judge correctly applied the aggravating factor found in §921.141(5)(e) Fla. Stat. (1977). The error in this position is that the only evidence which could reasonably be construed as an attempt to avoid arrest or detection, relates to actions of the Defendant subsequent to the murder.

We conceded in the Main Brief that the record contains some evidence that the Defendant attempted to conceal some evidence of the murder after it was committed. (Appellant's Brief, p. 36) However, §921.141(5)(e) Fla. Stat. (1977) requires the capital felony itself to be done for the purpose of avoiding arrest. Evidence of a subsequent cover up or concealment might be relevant on the issue of guilt, but the only evidence which will support the application of the §(5)(e) aggravating factor is evidence that the murder itself was committed to avoid arrest or detection. This section by its very terms applies to a situation where one is killed for the purpose of eliminating a witness to another crime.

For these reasons, we submit that the §(5)(e) aggravating circumstance was erroneously applied.

POINT NINE

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CAPITAL FELONY WAS PARTICULARLY HEINOUS, ATROCIOUS AND CRUEL.

In response to the arguments of the State on this point, the Defendant relies upon the arguments originally made in the Main Brief. (Appellant's Brief, p. 37-38).

POINT TEN

THE TRIAL JUDGE ERRED IN BASING TWO AGGRAVATING CIRCUMSTANCES ON ONE PRIOR ACT OF THE DEFENDANT.

In response to the arguments of the State on this point, the Defendant relies upon the arguments originally made in the Main Brief. (Appellant's Brief, p. 38-39).

POINT ELEVEN

THE INVOLUNTARY SEXUAL BATTERY WAS AN ESSENTIAL ELEMENT OF THE HOMICIDE AND AS SUCH, IT COULD NOT CONSTITUTIONALLY BE USED AS AN AGGRAVATING CIRCUMSTANCE.

The State's argument on this point succeeds only in establishing that there is no authority for the Defendant's position; not that it is wrong.

The Florida Capital Sentencing Statute is relatively new. Naturally there will be many arguments in the interpretation and application of the law which depend not upon blind adherence to precedent but rather upon logic and careful analysis of legal theory.

Counsel for the State has failed to point to any fallacy in the Defendant's logic. Surely the argument should not be rejected for the sole reason that it is not supported by any precendent. Perhaps it was not raised before.

For these reasons, it is respectfully submitted that the argument made in the Main Brief should be accepted by the Court.

CONCLUSION

The judgment of the trial court below should be reversed.

Respectfully submitted,

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Florida 32302
(904) 224-3636

ATTORNEY FOR DEFENDANT/APPELLANT,
ROBERT BRIAN WATERHOUSE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peggy Quince, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602 by U. S. Mail this _____ day of July, 1981.

PHILIP J. PADOVANO